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ABSTRACT

This report attempts to illustrate how courts have undertaken the task of relating the constitutional mandate for equal educational opportunity to the political and institutional issues posed in specific school desegregation cases since the Supreme Court's Brown decision. The first section of the report is an introduction to legalism and politics in school desegregation. The essay discusses the interplay between doctrinal development and political responses, focusing on decision making in both Federal trial and appellate courts. The seven sections that follow present the histories of school desegregation litigation in Dallas, Saint Louis, Wilmington, Minneapolis, Atlanta, Pasadena, and Denver. Each case study presents background information on the city and its school district, detailed descriptions of Federal and appellate litigation, desegregation plans and implementation resulting from court decisions, and the implications of the court decisions and desegregation plans. (MK)

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JUDICIAL MANAGEMENT OF SCHOOL DESEGREGATION CASES

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INTRODUCTION:

LEGALISM AND POLITICS IN SCHOOL DESEGREGATION

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Ⓒ 1979

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How has desegregation law developed over the quarter-century since the Supreme Court's decision on Brown v. Board of Education?[1] More particularly, how have courts gone about the task of relating a broad and evolving constitutional mandate to the political and institutional issues posed in specific cases? The partisans' positions on this question are clear. On the one side, the process is perceived as the gradual--too gradual--vindication of the constitutional rights of racial minorities, in the teeth of racially motivated resistance;[2] on the other side, judges are treated as having usurped the prerogatives of the policy-making branches of government, acting wholly outside their competence as judges.[3] This essay looks at the interplay between doctrinal development and political responses, focusing on decision making in both federal trial and appellate courts. It argues for a model of judicial decision making shaped by both political and doctrinal considerations, and for an understanding of the trial court as the occasionally authoritative participant in an ongoing process of negotiation bounded by constitutionally derived norms. Because this view evolves from more conventional understandings of the court as rationalist and, quite differently, as political actor, preliminary attention to these understandings is in order.

I. INTRODUCTION: LEGALISM, LEGAL REALISM, AND BEYOND

The dominant conception of the process of constitutional adjudication depends heavily on the rational capabilities of the courts. Judges apply reason, both in developing and extending norms. The imposition of those norms is held to proceed essentially hierarchically: legal rules, once declared, govern interchanges at lower levels of the judiciary, and indeed through the larger society.

So the convention holds: for if not in this way, then how might courts proceed? To be sure, views of what the reasoning process entails differ substantially. Once it was imagined that natural intentions, agreed-upon first principles, existed "out there," awaiting judicial discovery. If that aspiration now seems implausible, there remain those who would look not for natural law but for definitive historical truth. They liken the judges' task to a historical quest, designed to unearth the intentions of the Founding Fathers.[4] Others, less confident perhaps of the clarity that history might yield, look instead to the text to be interpreted as yielding authoritative interpretations. As Justice Roberts wrote, striking down the New Deal agricultural program as unconstituional, the Court has but one duty in constitutional litigation, "to lay the Article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[5] Thus conceived, the judge becomes little more than the builder, faithfully and unimaginatively following the plans of the architect. That view would, if susceptible of adoption, render the judiciary the "least dangerous branch," as the Federalist Papers envisioned they would be.

Would that it were so: yet the Constitution does not resemble a set of blueprints. At least since James Thayer's "The Origin and Scope of the American Doctrine of Constitutional Law,"[6] published three quarters of a century ago, legal scholars have recognized a more spacious ambit for judicial play. Federal courts make constitutional policy; the breadth of the governing provisions gives them no choice. Yet courts are decidedly different from other policy makers: were that not the case, they would merely be superseding one set of political judgments with another, a function very different from that laid down by the Constitution. Hence, the dominant intellectual task of those elaborating the conventional rationalist view has been to locate sources and specify the nature of the limits of the judicial function, the features which differentiate the judiciary from the overtly political branches of government.

To Thayer, the Court was permitted to exercise its prerogative of holding an enactment unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,--so clear that it is not open to rational question." Others have constructed different criteria for bounding the activities of the courts. In Herbert Wechsler's widely influential view, "neutral" principles--principles derivable from constitutional values and embodying a "content greater than any single concern of the moment"--served this function: for without reliance on principles of this sort, there was not judging, only politics.[7] As Alexander Bickel has observed, in elaborating Wechsler's position, "the process [of judicial review] is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable."[8] Where such principles cannot be had, where decisions are of the "it depends" variety, courts have no business intervening; it was in this light that Wechsler raised deeply troubling concerns about the rationale of the desegregation decisions, and about the rightness of the decisions themselves.

This conception of the process of judging is intimately linked to the conventional understanding of how legal rules get imposed: from the application of "reasoned elaboration" the predicate for general acquiescence, the basis of legitimation, stems. Within the judicial system, lower courts are institutionally bound to apply the standards developed at the appellate level; reversal of a lower court decision results from an incorrect application, not the exercise of independent, and divergent, judgment. But adherence to constitutional norms is not confined to the judicial system. Courts, which lack the power to tax or coerce, depend on the voluntary acceptance of their decision by many who are not parties to the litigation, individuals and agencies of governments who are, as the legal parlance has it, similarly situated. As Thomas Reed Powell once wrote with only slight exaggeration, courts can do no more than "to say something. The effect depends upon others."[9] Archibald Cox affirms the familiar view of this process: "Compliance results from the belief that . . . the courts are legitimately performing the function assigned to them"; that, in other words, they are resolving cases and controversies through the reasoned or principled amplification of the Constitution. "The ability to rationalize a constitutional judgment honestly in terms of principles referable to legal precedent and other accepted sources of law," Con continues, "is . . . an essential major ingredient of the Court's power to command acceptance and support."[10]

Self-imposed adherence to rationality at once justifies and secures the institutional legitimacy of the judiciary, affording courts a powerful and limited role. As Henry Hart wrote, the judiciary is "predestined in the long run, not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions, to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles. . . ."[11] In brief, reason begets authority.

This conception of adjudication draws a clear line between judging and politics. Impersonality, rationality, durability do not routinely constitute the stuff of political discourse. Politics seems, by comparison to adjudication, an altogether more short-sighted, personalistic, interest-centered, incremental way to resolve disputes. In The End of Liberalism, Theodore Lowi spoke approvingly of a "juridical democracy," which rested on this sharply drawn distinction between law and politics; the legal process, Lowi argued, can usefully "eliminate the political process at certain points."[12] Yet there have been those--the legal realists--who for the past half-century have insisted that the dichotomy is a false one. In their view, the stress on judicial reasoning rationalizes results reached on other grounds; by design, it deflects attention from those results, and to process.

"The vivid fictions and metaphors of traditional jurisprudence," Felix Cohen wrote some years ago, represent "poetical and mnemonic devices for formulating decisions reached on other grounds."[13] As to just what those other grounds might be, the legal realists were less certain. Cohen, who treats the decision-making process as one which poses profound moral dilemmas, locates the sources of judicial decisions in "social context, the background of precedent, and the practices and expectations, legal and extra-legal, which have grown up around a given type of action."[14] That formula is avowedly aspirational, not descriptive, and hardly constricting. Other realists took a more straightforwardly political view, holding that legal decisions merely masked "personal predilection, temporal political preferences, hunch--no more."[15] Not that that was a bad thing. The wise exercise of personal discretion seemed, at least to some of the realists, vastly preferable to the vices of "legalism." In a contemporary rendering of this position, advanced by Stuart Scheingold, court decisions become no more than gambits in a political game, rights won in the appellate courts merely something which can be used in bargaining for gains outside the purview of the court.[16]

Given such a view, gaining societal acceptance of court decisions becomes less a matter of retaining legitimacy than of exercising a special kind of political skill. As Martin Shapiro has written: "The real problem is how the Supreme Court can pursue its policy goals without violating those popular and professional expectations of neutrality, which are an important factor in our legal tradition and a principal source of the Court's prestige."[17]

This half-century sequence of skirmishes between rationalism and realism, between principle and politics, may well misstate the issue. There is, to be sure, a tension between the strategies of judicial decision set forth by the partisans to this debate, but that tension does not necessarily demand that one side or the other, rationalism or realism, be seen as adequate to explain the behavior of the appellate courts. As Alexander Bickel has written: "No society. . . can fail in time to explode if deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle ridden. . . . The role of principle, when it cannot be the immutable governing rule, is to affect the tendency of policies of expediency."[18] Bickel outlined one judicial strategy, which entailed a judicial reluctance to rush to judgment, as a means of reducing the tension, permitting the judiciary to function as a principled political institution. Judicial delay would signal the legislature that it ought to act, and set the bounds for that action; judicial decision, when it came, could consequently lay greater claim to popular and political acquiescence, if not support, than would otherwise be the case.

Reliance on these "passive virtues" was viewed by Bickel as the only appropriate way for the Supreme Court to perform this function. Yet artful dodging is better treated, not as an end but as a means of shaping the relationship between court and legislature, and between court and country. The way in which substantive doctrine gets shaped affects this process as well:

> Over time, as a problem is lived with, the Court does not work in isolation to divine the answer that is right. It has the means to elicit partial answers and reactions from the other institutions, and to try tentative answers itself. When at last the Court decides that "judgment cannot be escaped--the judgment of this Court," the answer is likely to be a proposition "to which widespread acceptance may fairly be attributed," because in the course of a continuing colloquy with the political institutions and with society at large, the Court has shaped and reduced the question, and perhaps because it has rendered the answer familiar if not obvious. 19

The idea of colloquy, of an iterative process is a critical one. The Court does not know the underlying principle in advance; or at least it does not know it in the fullness which would render the principle "neutral." The principle evolves, in part through the actions of the other branches of government as they respond to the Court's direction giving, in part through the remedial decrees that the Court shapes as it moves, step by step, away from the constitutional wrong. Seen in this light, doctrinal development becomes a process which partakes of both the principled and the political. Principle and politics are at once in necessary connection and necessary tension with one another.

* * *

The debate between rationalists and realists over the ways in which appellate courts develop constitutional doctrine has its analog in competing assessments of fact finding and remedy framing in trial courts, particularly with respect to cases involving broad questions of institutional reform.

The traditional model of the trial regards cases as narrowly bounded disputes between two parties. The scope of the dispute is shaped by the parties within the confines of existing law, and the outcome affects only the parties. Fact finding, whether by the trial judge or the jury, focuses on events that have already occurred. This process occupies center stage in the traditional model: it is the capacity of the adversarial system to sort through disputed facts on its way to the truth, to function as the legal analog of the scientific method, that best guarantees fair outcomes. The judge presides over the hearing, rarely intervening except for purposes of clarification; that passive stance, it is felt, reinforces his disinterestedness in the controversy, and hence his legitimacy as judge:

> The paradigmatic form for law, trial in court, reinforces the necessity to exalt the role of rule. In the paradigm, the judge hears conflicting parties and decides upon the evidence which they present. The evidence is related to his decision through his selection of a rule. If the judge looks at who the parties are, he is not looking at the evidence. A judge who takes into account who the parties are will favor one or the other. A biased judge is no judge at all.
>
> If the judge looks at the rules, he is acting in accordance with the paradigm, which requires two persons to be in controversy, and a third person, who prefers neither, to decide. The judge indicates his impartiality, he proves his good faith, by looking not at the persons but at the rule. The rule is neutral, 'above' the contestants and the judge.20

This understanding of the trial process has seldom undergone scrutiny. The relationship between the adjudicative process and negotiations designed to secure settlement, between adjudication and the needs of the judicial system conceived as a complex organization, and between the conduct of trials and the dictates of local politics: each of these has been addressed only rarely.[21] In private law litigation, it is generally taken for granted that courts function as engines of logic.

Cases involving institutional reform pose the severest test to this view of the trial court.[22] Such cases are future-oriented, entail disputes over policy among diffuse interests, and are managed by the judge; they appear disconcertingly nonjudicial. As Archibald Cox reports, the courts have embarked "upon programmes having typically administrative, executive, and even legislative characteristics heretofore thought to make the activity unsuited to judicial undertaking."[23]

The heart of the difference between these types of litigation lies in the nature and function of the remedy. Traditionally, the remedy flows straightforwardly from the definition of the wrong. In disputes among private litigants, legal injury was recompensed by an award of monetary damages. Only where a damage award did not in fact compensate would the court entertain an equitable remedy, typically enjoining the unlawful behavior. Even in litigation involving the government, a one-time order proscribing unlawful official conduct in a discrete instance, entailing no ongoing judicial involvement, has normally sufficed.[24]

Where the focus is not on the isolated misdeed of an official but on what is seen as an institutional defect, a substantially broader decree has become the norm. In suits concerning conditions in mental hospitals, institutions for the handicapped, prisons, and schools, each asserting a constitutionally grounded claim for fair treatment (treatment that is either minimally adequate or nondiscriminatory), the familiar injunction, which in effect urges a public official to cease misbehaving, has been regarded by numerous courts as inadequate to the task at hand. In these suits, courts preside over nothing less than a reorganization of public institutions, entailing reallocations of resources, redesign of bureaucratic structures, even changes in institutional mission. Judicial involvement in these cases does not end with a declaration of rights and obligations, but rather sets in motion a continuing relationship between court and parties, with the judge or the judge's delegate--a court-appointed master or reviewing commission--superintending the implementation of the decree. Remedy design, at one time almost a legal afterthought, has emerged as the "center piece" of the institutional reform litigation.[25] This expansion of the judicial role has noteworthy societal effects as well. Nathan Glazer, pushing the point to its extreme, writes that such decisions:

> are beginning to shape the entire structure of social policy. They are determining which of the factions disputing policies and their implementation are to be strengthened, and which weakened. . . . They are significantly determining how resources within any given branch of social policy are to be distributed, and how they are to be distributed among the several branches of social policy.

Do courts have the capacity to take on such responsibilities? Those adhering to the traditional view perceive a mismatch between the attributes of adjudication and the demands posed by managing change in public organizations. The key, of course, resides in determining what adjudication can, and should, entail. Adjudication, Donald Horowitz asserts, is in several respects a limited instrument of problem solving. It focuses on the rights of parties, and does not permit a discussion of policy alternatives; the remedial power of courts is unduly constricting, limited to the issuance of coercive orders; it is piecemeal, concerned only with the dispute at hand, incremental and not holistic in character; its initiation depends on the actions of the parties, and thus does not enable the court to make its own independent assessment of when something is wrong or to assess the representative nature of the dispute before it; it is ill-suited to the ascertainment of social facts, "the recurrent patterns of behavior on which policy must be based," for these are not readily susceptible to proof, as courts understand that process; it does not permit policy learning, and consequent modification of direction, by the courts.[27] These limitations are held to inhere in the very concept of adjudication, rendering courts ill-suited to resolve what Alexander Bickel has termed "problems of great magnitude and pervasive ramifications, problems with complex roots and unexpectedly multiplying offshoots."[28] Such "polycentric" problems, it is said, demand a managerial, and not an adjudicative decision, which a court cannot supply.[29]

This critique needs to be tested in two quite distinct ways. Assuming that adjudication has been accurately described, one would want to know how differently the other branches of government operate: Is incrementalism a mode of action particularly associated with the courts? Is the bureaucrat's tendency to "grease the squeaky wheel," or the legislature's responsiveness to pressure group activity, significantly different from the court's powerlessness to act on its own? Do the legislative and executive branches have greater capacity to obtain social data? How likely are those branches to reverse course, in the face of signals that policy initiatives have misfired? These questions deserve to be answered, not by relying on textbook models of the separation of power but empirically, by examining what government actually does.[30]

Of greater moment for our present purpose is the assumption that courts conform in fact to the traditional adjudicative model when hearing institutional reform cases. The criticism of the courts' capacity to resolve such grievances assumes that judges are responding to novel demands in familiar ways. By contrast, the "public law" model of litigation suggests a very different and altogether more political decision-making apparatus. It is at least plausible to hypothesize that, when confronted with an apparently new set of tasks--as in the institutional reform cases--courts have begun to alter the ways in which they discharge their responsibilities. To the extent that issues put to the judges join political with legal concerns, and involve matters of policy rather than disputes over rights, a fact-finding and especially a remedy-framing process more characteristic of the political than the judicial branches of government might be expected to evolve. Negotiation, compromise, persuasion, tradeoffs: these political behaviors would be anticipated to find their way into the decision-making process in institutional reform litigation.

The matter is more complicated yet. Were the courts regarded as political institutions, as Robert Dahl has noted, "no particular problems would arise, for it would be taken for granted that the members of the Court would resolve questions of fact and value by introducing assumptions derived from their own predispositions or those of influential clienteles and constituencies."[31] But courts are not just political agencies, in this sense: popular perception and judicial self-perception both reveal as much. They are also lawmakers who derive their authority from the fit between the decisions they reach and constitutional authority for that decision. Consequently:

> At each stage of litigation the court must remain faithful both to the legal mandate that makes its judgment authoritative and to the realities of the situation the court has been called upon to address. Success at this enormously difficult task affords legitimacy to what the court is doing; it makes resolution of the dispute, and implementation of the remedial order, more likely to succeed.[32]

In such situations, the political process functions in the shadow of law to shape the decision. The legal standard signals "the general direction to be pursued and a few salient landmarks to be sought out or avoided";[33] within the scope of law, political interchange, managed by the court, takes place. The process is political in stressing institutional policies rather than specifiable grievances, negotiable interests rather than unyielding entitlements. In some circumstances, it is political in a second sense: the process functions iteratively, as a sequence of mutual adjustments in which the court guides the parties to reach an agreement within the bounds fixed by the applicable substantive law. This hypothesized relationship between courts and the governmental and private interests in disputes does not differ greatly from the colloquy that, as Alexander Bickel describes it, occurs at a different level of government, between the Supreme Court and the coordinate branches.

This essay focuses on the interplay between doctrinal and political considerations at both the appellate and trial levels. It uses the history of school desegregation litigation to illumine more general tendencies on the part of the courts, to identify by illustration the tasks that courts are performing.

That emphasis is for several reasona appropriate. The school desegregation cases were the first institutional reform cases, and have remained the "ideal" case. Desegregation decisions of the past decades "have all the qualities of social legislation: they pertain to the future; they are mandatory; they govern millions of people; they reorder people's lives in ways that benefit some and disappoint others in order to achieve social objectives."[34] In these respects, they have served as a model for other such suits. The post-Brown remedy decisions, it is said, create "a magnetic field around the courts, attracting litigation in areas where judicial intervention had earlier seemed implausible."[35] Even critics of this mode of litigation recognize that relief of institution-wide scope is necessary in this realm. "[T]he general proposition seems undeniable that some degree of judicial supervision or intervention on a more than sporadic basis was essential for the effectuation of the underlying constitutional right."[36] Enthusiasts detect in other reaches the same sorts of institutional misbehavior manifested in segregated schools;[37] it is this supposed similarity, coupled with the belief that the remedy-implementing is "much the same whether the institution is a hospital, a prison, or a school,"[38] that has been held to justify the expansion of this form of remedial regime beyond its original setting.

The desegregation cases are at once the most settled and the most controversial area of institutional reform litigation. Twenty-five years of case law yields a rich record; it also prompts continuing unhappiness with what the courts have done. Antagonists assault the opinions on substantive grounds: the ambit of the desegregation decisions, it is said, is uncertain, the decisions themselves lacking constitutional warrant. The process by which such remedies are reached has more routinely been likened to monarchical command than a political process in which the court stays its hand. The most explosive cases of the decade--Boston, Louisville, Los Angeles--do not call to mind a picture of the court as political manager. Rather, as Leno Graglia acidly observed of a particular district court judge: "His opinions show great confidence in his ability to prescribe for social ills and a deep belief that the prescriptions were constituional commands."[39] Understanding the range of postures that courts deciding desegregation cases have adopted should both shed light on the broader domain of institutional reform litigation and permit a more refined analysis of the desegregation case law itself.

This essay identifies the doctrinal context within which desegregation remedy-framing has been carried out. It notes the linkage between doctrine and politics, and the colloquy between branches of government, that has persisted since the Brown decision, identifying the consequences of that history on the lower courts. It also specifies several characteristics of remedy setting: it analyzes the relevance of received legal standards, and the complex interrelationship between those standards and the management of a political relationship designed to result in an acceptable, and constitutionally permissible, remedy.

II. THE SUPREME COURT AND RACE: POLITICS AND PRINCIPLE

The Supreme Court's decision in Brown v. Board of Education stands as the most important decision of this century--perhaps the most important, in its ramifications for the larger society, ever issued by the Supreme Court. That decision did no less than to help set in motion a social revolution, and thus to contribute to a fundamental alteration of relationships between black and white in this country. To be sure, the Court did not act without prior warning. For those who had been looking, Supreme Court opinions striking down segregation in the context of higher education, which dated back through three decades, served as powerful precedent for Brown.[40] Nor did it act alone: in 1954, as had not been the case in 1896, much of the country outside the South understood that in America's manifestly unequal treatment of blacks inhered a moral dilemma, if not a moral outrage. Yet the precedent had not been seen as a harbinger, and the North and West lacked sufficient interest in the plight of the Negro to adopt legislation proscribing racial discrimination. Only in a nation with a judicial system as powerful as the United States could a court speak to such a question; and even in the United States, the enterprise was fraught with peril. Once the constitutionality of segregation was squarely and unavoidably posed, the Court could reach no other decision than to condemn it as the deepest form of racial insult, "a grievous evil."[41] Yet even as it acted, the Court was necessarily concerned about the political implications of its decision. That concern necessarily shaped both the nature of the wrong and the scope of the remedy that the Court ordered. In this respect, the Court was at once principled and political.

"No single decision has had more moral force than Brown; few struggles have been morally more significant than the one for racial integration of American life," writes J. Harvie Wilkinson III. "Yet school desegregation may be the most political item on the Court's agenda."[42] The ambiguities which reside in Brown reveal this duality: Was it segregation itself which constituted the wrong, or just segregation mandated by law? Was segregation wrongful because it distinguished on the basis of race or because it delimited the educational futures of black children? These are nominally matters of doctrine; but the Court's lack of clarity in explicating doctrine has required a different sort of reasoning process, one which defines the wrong by inspecting what is required by way of remedy. The judicial decision-making process with respect to segregation is thus, at its heart, incremental. Wrong defines remedy, which in turn redefines wrong. The Court moves away from the evil to be undone, not toward some predetermined end. Brown sets in motion a decision-making strategy, rather than resolving a problem.

For these reasons, the second Brown decision, which addresses the question of remedy, assumes special importance.[43] That opinion is, of course, best remembered for permitting desegregation to proceed with "all deliberate speed." This standard subordinates the vindication of individual claims to the broader policy concern of securing general acceptance of the Court's edict through gradualism, and in so doing runs contrary to expectations concerning judicial behavior. In Brown II, the Court also left the determination of the pace and scope of the remedy to individual case determination, providing only the loosest of guidance; in that process, the specifics of the remedy ordered served as a way of identifying the constitutional evil to be undone. Remedy-framing itself is structured by the Court to make it necessarily and properly one which takes into account concerns relating to policy and politics.

The particular factors deemed by the Court to be pertinent in this enterprise are themselves political in nature: "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas to achieve a system of determining admission to the public schools on a nonracial basis." Some of these are technical matters, hardly warranting postponing desegregation. Others--"the physical condition of the school plant," for example--suggest that, in the Court's eyes, white schoolchildren could not be expected to attend the formerly black school, despite protestations that black and white schools were in fact equal. These issues were better resolved by political than by judicial initiative. "School authorities have the primary responsibility for elucidating, assessing, and solving these problems. . . ." Only if the political system defaulted should lower courts intervene. "[C]ourts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

Looking backwards, such language sounds pious rather than plausible in its expectation that courts would act only in the face of political default. The extent and scope of Southern resistance makes such judicial modesty blushingly naive. Between 1955 and 1968, however, that was essentially all the guidance that the Supreme Court offered on the matter. Only with the most exceptional case--as with the outright and direct challenge to the authority of the judiciary, in Little Rock--was the Supreme Court roused to action.[44] Consequently, district court judges enjoyed considerable discretion during this era. While somewhat constrained by the Brown opinions, the course of desegregation litigation varied enormously from court to court. Even as the district court judge in New Orleans was striking down attempt after attempt to evade the most modest amount of desegregation, insisting finally upon adoption of "his personally devised desegregation plan," the judge in Dallas was promoting a "pepper and salt" scheme which formally designated schools as black, white, and mixed, and allowed parents to choose among them.[45]

The generalities of Brown, coupled with deep political antagonism in the South and a hands-off attitude in Congress, provoked definance rather than implementation of desegregation. Those courts committed to Brown began borrowing a page from the New Orleans history, substituting specific requirements for general guidelines. Bolstered by the passage of the 1964 Civil Rights Act, which added Congressional support to the judicial arsenal, the Fifth Circuit (which includes the Deep South) developed a sophisticated and highly detailed remedial jurisprudence. In Jefferson County, that court ordered adoption of a freedom of choice plan larded with judicially-imposed specifics.[46] The timing and form of the announcement, the nature of equalization efforts among schools, the remedial programs which would be offered, the location of new schools, the reassignment of faculty: each was spelled out in the decree. Concern with the pace of desegregation led the lower courts increasingly to direct their discretionary authority to the end of rapidly accomplishing desegregation.

Beginning with its 1968 decision in Green v. New Kent County,[47] the Supreme Court confirmed and further hastened that endeavor. In Green, the Court cast considerable doubt on whether free choice was ever a constitutionally appropriate remedy; in Alexander v. Holmes County Board of Education,[48] it insisted upon immediate implementation of districtwide desegregation; and in Swann v. Charlotte-Mecklenberg Board of Education,[49] it approved a truly massive busing order. The language in those cases gave considerably more guidance to lower courts: Green demanded remedies which "promise realistically to work now" (and by "work" the Court plainly meant achieving racial mixing); Alexander demanded desegregation "at once." If these cases narrowed the scope of trial court discretion, and hence the possibilities of a politically-driven resolution of a desegregation suit, they hardly foreclosed the matter. This persistence of ambiguity is attributable partly to the necessary imprecision of language, more significantly to a willed lack of clarity in the opinions themselves.

Consider Swann, the most influential of these decisions and an opinion which is in some respects highly prescriptive. Swann notes the need for the Court to "amplify guidelines. . . . defin[ing] how far this remedial power extends. . ." With respect to student assignment, the Court identifies the circumstances under which one-race schools are permissible; the need for "frank--and sometimes drastic--gerrymandering of school districts and attendance zones"; and the scope of permissible busing (limited only by circumstances when "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process"). Even as it offered guidance, the Court created new, if more limited, zones of discretion for the district court. How might a school district show that a one-race school was "genuinely nondiscriminatory"? How does a court determine whether busing will "impinge on the educational process"? The Supreme Court chose not to address these questions. In leaving such matters to district courts, the Swann decision reaffirms the premise of Brown II. "Once a right and a violation of that right have been shown the scope of the District Court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

When they are so minded and when circumstances appear to warrant, the justices can more tightly cabin the lower courts: a comparison of Swann with the reapportionment, criminal process, and abortion cases is instructive in this regard. "One man, one vote" finds its equivalent, for purposes of desegregation, in racial ratios--and these the Court chose not to impose, or even to permit. In choosing a different course, the Court could not have been unaware of the political ramifications of its action. Swann continues to represent the boldest judicial foray with respect to desegregation remedies, a high-water mark for judicial activism. It was bound to evoke controversy. Better, the Court apparently concluded, to leave these matters in the hands of lower courts, whose sense of nuance could be applied in the service of minimizing controversy. If the Court demonstrated its impatience with the progress of desegregation in the South, it was never willing to spearhead a second Reconstruction;local values, reflected in the fact situations and remedial proposals presented to the lower courts, continued to count for something.[50]

The North was another story. For a decade, the Supreme Court ardently embraced the passive virtues, declining to review Northern desegregation disputes. When the Denver case was finally accepted for review, the Court resisted imposing a national standard with respect to desegregation, despite the apparent similarities between the Northern and Southern situations two decades after Brown. The holding in Keyes v. School District #1, Denver[51] -- once deliberate segregation has been shown to exist in a significant portion of a Northern school district, a Swann-type remedy of districtwide scope properly follows--has since been hedged round by opinions attempting more precisely to link wrong and remedy.[52] These cases call upon courts to perform feats of prestidigitation, imagining what the school district would be like if no illegal segregation had occurred; they systematically ignore the contribution of housing segregation to school segregation; and they restrict the capacity of courts to order remedies which cross district lines. These decisions do not bound, so much as redirect, the flexibility inherent in lower courts. In its second decision in Bradley v. Milliken,[53] the Court approved a judicially-ordered remedial regime for Detroit which reached to revisions of the student discipline code, creation of vocational schools, mandated teacher retraining intervention into almost all of a school district's educational and administrative practices. Of course, such remedies must be coupled to the wrong of racial discrimination. But discrimination remains diverse, multifaceted, amorphous, and immense; for that reason, as the Court sees the issue, only the district court judge can fully determine the education policy bounds of the remedy.

Small wonder then that, even after the Denver and Charlotte-Mecklenberg decisions, district court judges could, as Gary Orfield observed, "treat similar facts very differently."[54] The governing judicial standards, hardly crystal clear, left trial courts freedom to do so. The plaint of the district judge in the Indianapolis case--"really, we are out in the wilderness without much precedent one way or the other"[55] --has been frequently heard. From Brown to the present, the Court has eschewed a preemptive role. It perceives the issues posed in the segregation cases as, in some part, educational problems calling for an "educational solution";[56] it has not insisted upon the full vindication of legal rights, an enterprise properly pursued with no mind to the practical implications of the Court's actions. The Court has recognized also the importantly political aspect of the issue. Its decisions of the past quarter-century "pleaded, mediated, mollified, or even withdrew";[57] only in the years between Green and Keyes can they be said significantly to have imposed. Treated as a whole, the Court's race cases teach "that competing moral claims" rooted in constitutional values "must be brokered and negotiated."[58] As political statements, these decisions reaffirm that the constitution is not, as Justice Jackson put it, "a suicide pact; it does not require self-defeating acts."[59] Yet the decisions are not just political or educational statements. They derive their strength from their constitutional underpinnings, their exemplification of the aspiration to evenhanded treatment embodied in the Fourteenth Amendment. Is it any surprise, then, that district court judges in desegregation cases have found themselves with varied and complicated tasks to perform, obliged to be at once constitutional exegetes, political power brokers, and educational experts?

III. DESEGREGATION AND THE DISTRICT COURTS: THE LEGALIST ASPIRATION

The traditional conception of litigation powerfully and persistently influences thinking about what courts do do, and ought to do. Few judges would embrace Alexander Bickel's characterization--"holding roving commissions as problem solvers . . . charged with a duty to act when majoritarian institutions do not"[60] --as applicable to them. In Hobson v. Hansen, a desegregation case which in the scope and particularity of judicial intervention serves as a model for institutional reform decrees, Judge J. Skelly Wright sought to reconcile the sweep of his opinion with a commitment to judicial restraint:

> It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and

> political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where Constitutional rights hang in the balance.[61]

That last phrase is the key. Courts, in Judge Wright's view, do not simply break political logjams; only when there is a connection between political failure and constitutional rights do courts have license to intervene.

Yet the bounding of constitutional rights is not easily accomplished, especially where the legal source is a constitutional provision as designedly elastic as the Fourteenth Amendment. That amendment manifests a commitment to equality as powerful as it is vague; and judicial decisions elaborating and expanding upon that entitlement set in motion a train of further expectations. The court, having responded to one problem, must then look at assertedly similar problems. Having intervened with respect to wretched conditions in the prisons the court must next inquire into mental hospitals; or the court, having found unconstitutionality in the worst of prison conditions, is called on to consider those only slightly better. Similarly, having concerned itself with the plight of one especially disadvantaged group, one "discrete and insular minority,"[62] the court is confronted with another group, said to be constitutionally as deserving, or almost as deserving, of judicial solicitude: in this way, women seek to equate their plight with that of blacks, while the aged (or the young) draw on the claims made by women. And so it goes. "[J]udicial activism feeds on itself. The public has come to expect the Court to intervene against gross abuses. And so the Court must intervene."[63]

This point is at once familiar and problematic. "Must" has to be treated as rhetoric; as the first Justice Marshall taught us, and the legal realists reminded us, judges often enough intervene first and rationalize later. But something more than rationalization is involved, in desegregation as in other legal realms. When they act in ways which seem quintessentially political, as in removing the headmaster of a Boston high school, or even suprapolitical, as in banning antibusing meetings in Denver, courts take great pains to join what they are about to a received tradition.

Activism is coupled to legal traditionalism in myriad ways. At times, the linkages appear merely hypocrisies, veils concealing judicial behavior which has its source and inspiration elsewhere. Even as he was proposing to convert a school desegregation suit involving a single school into a case requiring the desegregation of public housing throughout Coney Island, Judge Weinstein sounds like Felix Frankfurter reincarnated:

> As institutions with limited powers, courts are mandated by law and tradition to interfere as little as possible in the work of other branches of government. So long as the Constitution and laws are not violated, state school officials must be afforded the broadest latitude to meet their educational responsibilities. 64

Similarly, in the Indianapolis case, the trial court appeared bent on ordering a metropolitan remedy, persisting in this even after the Supreme Court had sharply constrained such orders; at the least, the district court pushed at the limits of the legally permissible. Yet Judge Dillin sees it otherwise:

> [I]t is my absolute and positive duty to follow the law and desegregate the Indianapolis public schools. . . . If I die tomorrow, someone else would have the same duty and I don't know that they could do differently. 65

The court, according to this rendering, does not make law; it has not even that creative license vouchsafed judges by Henry Hart; it is, rather Justice Roberts' builder, laying facts alongside constitutional standard. And that decision-making process, as another judge writes, guarantees that case results will not depend on who is judging the matter:

> The quality of justice cannot be dependent upon the identity of a particular individual who sits on a particular Court at a particular time. A general uniformity of justice is effected by the nature and structure of our judicial system. It is the process, not the particular person, which determines the justice applied in our society.66

Process, not person, as determinative: were it otherwise, the activities of the district court might be thought arbitrary elaborations of a personal philosophy rather than the application of principle in concrete circumstances. This is a vital point for the judges to maintain. It matters that those affected by court opinions accept this essentially legalist view of the judiciary, for that makes support easier to come by; it is, after all, the process, not the outcome, for which support is asked. A contrary perception is more likely to evoke resistance. The Indianapolis case provides a colorful illustration. A state court judge sought to impeach Judge Dillin, claiming that the court had "seized the reins of civil authority and deposed a duly elected qualified school board of this state as effectively as Castro took power of [sic] Cuba. . . without any more legal warrant."[67]

More than camouflage is involved in reliance on legalism. The rhetoric also reveals the court's self-perception, which is decidedly legalist, and that perception helps to shape what the court will do. Obeisance to legal norms tells only part of the judicial story, but it is a significant part nonetheless. The limits imposed by law shape the lawsuit in a variety of ways. They restrict the interests that courts will recognize as intervenors to those with a stake in the controversy whose point of view is inadequately represented by the original parties: intervention for political purposes, by those on either side of the controversy, is sharply discouraged. "[This Court will not assume] the additional burden of dealing with sham issues put forward in the interest of political opportunism. . . ."[68] They also constrict the scope of the questions that a court will entertain. In the midst of desegregation suits, styled as disputes between black plaintiffs and the school district, other groups with distinct but assertedly related grievances will seek to participate in the litigation. While an expansion of the scope of the desegregation suit has generally been permitted when the connection can persuasively be made--as when the would-be intervenors represent limited-English-speaking students, for whom desegregation is assertedly an inadequate remedy--courts have not permitted these suits to become forums for educational policy generally. For that reason, even activist courts have rebuffed efforts to incorporate the claims of the handicapped in desegregation litigation. Denying such a motion, Judge Doyle in Denver observed:

> We have enough to do here without reaching out into this area that hasn't even been defined as an issue in the case . . . [T]his is undoubtedly a problem. But I don't think that it's a problem that is the kind of constitutional violation about which you [the original plaintiff class] are complaining.[69]

The significance of legalist concerns is also manifest when legal and educational policy questions, or legal and political questions, collide. Not infrequently, judges eschew taking any responsibility for educational concerns. As the trial judge in Milwaukee declared: "The existence of a constitutional violation does not put the district court in the business of running a school system. The district court's only legitimate concern is to see to it that the constitutional violation is corrected."[70] Such statements take on particular significance when the judge, as in the Little Rock suit, perceives a choice between educational and legalist concerns:

> The Court also realizes that the money that the District is going to spend for transportation will have to come out of funds that otherwise would be spent for increased salaries, educational supplies and materials, and for other conventional and desirable educational purposes. There is nothing that the Court can do about that. At this time at least the duty of the District to comply with the requirements of the Supreme Court, the Court of Appeals, and this Court in the matter of integration must take priority over ordinary educational considerations.[71]

Where political issues are explicitly broached, judicial affirmance of the primacy of constitutional values is commonplace. Judge Real, hearing the Pasadena case, dismissed public opinion as irrelevant to the deliberations: "I have a constitutional duty to decide cases not the way people want them [decided] but the way I feel is proper to decide them."[72] As Judge Doyle in Denver noted:

> The shape of the constitution is not dependent upon the way the people vote. . . . So I expect that the voice of the people is entitled to some consideration, but if it's in conflict with the Constitution of the United States, why, it's not going to carry any weight. It can't, in a court of law. The law is something else.[73]

The Wilmington litigation may best illustrate the impact of legalist concerns on the shaping of a lawsuit.[74] Because that case involved creation of a metropolitan school district, it might be regarded as an adventure in judicial policy making which exceeds the legally permissible; that, at least, is how those who sought the impeachment of the district court judge, arguing that "the likelihood of a revolutionary change in the Delaware public school system [brought about by the desegregation suit] has interfered with the function of that system,"[75] saw the matter. This perception misrepresents the facts, however. The task which the court sets for itself is a bounded legalist task: "to order a remedy which will place the victims of the violation in substantially the position which they would have occupied had the violation not occurred."[76] Application of that standard leads the court to insist on metropolitan area relief: "The entire northern New Castle area must be treated as one community in terms of its population characteristics, because that is the way it was perceived and treated by the State and its citizenry."[77]

At each subsequent stage in the proceedings, legalist--as distinguished from policy--concerns shape the suit, minimizing the policy-making role of the court. The particular remedy proposed by the court serves as a case in point. One suggested approach, involving urban-suburban school clusters, is rejected because "fraught with complex problems unsuited for judicial determination." Another proposed plan has the regrettable consequence of "plac[ing] the Court in the ongoing position of general supervisor of education in New Castle County. In the event of disagreements over curriculum patterns or textbooks, the Court or a master would have to step in." Judicial creation of several new districts is resisted because there exists "little guidance from state or federal constitutional guarantees." The court does not mandate a countywide district because that would involve a "major shift in Delaware school policy."[78] The court's order is designed to intrude least upon the political workings of the system; and it explicitly permits the state legislature to develop its own alternative plan.

The Wilmington decision is limited too with respect to the scope of issues treated, for reasons which bear quoting at length:

> The operation of the public schools is traditionally a matter of local concern, and properly so. This court has intervened only reluctantly in that process, and only for limited purposes. We were urged throughout the hearings in this case to be concerned with the "quality of education" offered by the area schools. That is much more properly the concern of local officials and the parents of children in the schools. Our duty here is not to impose quality education even if we could define that term. . . . We do not find in Brown a mandate for District Courts to concern themselves with how well the educative function is performed . . . . There has been much discussion, and there undoubtedly will continue to be much writing upon the topic of whether black children learn better in desegregated classrooms. Our holding does not rest upon these considerations, not least because judges are unqualified and inexpert in answering such questions.[79]

In subsequent stages of the litigation, the court continued to be governed by legalist norms. It declined to establish a monitoring body, harkening to the traditional judicial role to explain this self-imposed restraint. "The existing committees have derived their power from the concern of State or local officials and groups. To add the power of the Court to these groups would raise disturbing issues of how to support and supervise such an ad hoc 'master'."[80] Only when the court was confronted with a "total abdication of responsibility over a period of time such that further delay significantly jeopardizes constitutional rights"[81] did it intervene, as most controversially in fixing a tax rate for the newly constituted school district.

Some courts are, to be sure, far less affected by legalist standards. In Atlanta, for instance, the district court strove to provide what was "practical."[82] And in St. Louis, the court approved a consent agreement which, in requiring almost no desegregation, clearly fell below the constitutional standard set by the Supreme Court. Judge Meredith preferred realism to legalism--and predicted that the Supreme Court would as well. "There's an old saying that the Supreme Court follows election returns. That's not entirely true, but there is something to it."[83] The influence of legalism assuredly varies, from case to case; it is, however, almost never an insubstantial influence. Conversely, cases in which the legalist mode predominates cannot be understood as merely entailing the elaboration of a constitutional standard, wholly apart from political factors; the operant constitutional yardsticks are just too vague, the context too intrusive, for that. In a great many of the desegregation cases, law, politics, and educational policy concerns coexist in interdependent fashion. The nature of those interrelationships is explored in the next section.

IV. DESEGREGATION AND THE DISTRICT COURTS: MANAGING A POLITICAL PROCESS

A. The Politics of Desegregation

In particular locales race and schooling issues emerge as at once political and legal problems. The matter is usually first posed as a political question, in which, as with other political questions, parties bargain to reach some satisfactory resolution. Where that process succeeds, as it often does, the issue never comes to court. Although the presently prevailing understanding of desegregation presumes that legal sanctions are required if the effort is to succeed, the facts are otherwise: much desegregation has been effectuated without a court order.

Even in those instances, however, the possibility of recourse to the courts affects the political bargaining.[84] The threat of a lawsuit is sometimes put forward to increase the bargaining strength of civil rights advocates; in other, rarer instances, litigation is regarded as a confession of failure, an indication either of intolerance or divisiveness inconsistent with the community self-perception. In either event, the law--or the shadow of the law--has a part in the affray. The considerable case study literature does not reveal the existence of a community which confronted these questions without paying some heed to their constitutional dimension.

The legalization of a dispute over desegregation, through the filing of a lawsuit, signals a breakdown in the political process: bargaining gives way to stance-taking, interests harden into claims of rights.[85] That transformation does not occur quickly or lightly. While most Northern desegregation suits were filed no earlier than the 1970s, the issue of racial justice in the schools was framed a decade earlier. In some cities, such as San Francisco, a political settlement was nearly in hand; only a last-minute effort by city officials to undo the settlement, premising their action on principled concerns, led the NAACP to "seek an instant solution in federal court."[86] Elsewhere, political obduracy--as in Boston--or procrastination--as in Minneapolis[87]--provoked civil rights groups to file suit. Political fatigue may also precipitate litigation. "The heck with organizing and trying to get everyone to maintain their interest. With a lawsuit you need only a few committed people," a Minneapolis civil rights activist noted.[88]

Recourse to the courts does not signal an end to politics, but rather a new stage in the ongoing political process. The parties to the desegregation litigation are not strangers to one another. The issues over which they differ are familiar: Who is to blame for the extant segregation? What should be done about it? The forum is new, as is the introduction of an additional participant, the judge, with considerable formal authority. Because the court can render a legally authoritative decision resolving disputes among the parties, it exercises substantial potential power. That power can be used to order a particular outcome, or to reconfigure relationships among the several parties to the dispute. The court may attempt to do both things, taking authoritative action with respect to one aspect of the dispute, while leaving others for negotiation.

Judicial authority, although substantial, is also significantly constrained: courts cannot guarantee a solution which "works." Just as desegregation was an essentially political matter prior to litigation, so too is it a political matter (albeit of a different sort) after judicial resolution of a case. While legal mandates affect the implementing of court-ordered desegregation remedies, that enterprise depends centrally on mobilizing diverse community resources, including good will, to achieve the desired outcome. Where, as with desegregation, what may well be wanted is, not a specifiable end, but a process which can adapt to the radical change of circumstances that desegregation brings, the subtler persuasive arts are likely to matter rather more than the brute force of decision, standing by itself. Courts cannot run school systems.

The more narrowly the court defines successful implementation, the more possible it is to achieve it: thus, the temptation to convert implementation of a systemic policy change into a matter of compliance with a narrow judicial role.[89] A court interested in asserting its own power might focus on racial mixing, a policy change easier to implement than an order mandating adjustments in the organization, financing, or instructional mission of the schools. At first glance, the so-called "racial balance" decree looks rather like a reapportionment decision which limits the permissible population deviation in electoral districts, or a criminal-process decision mandating the specifics of the warning that suspects must be given. Yet, these similarities deceive. In the nonschool contexts, the court has continuing leverage over the institution which has been ordered to take a particular course of action. A court can draft its own reapportionment plan, thus accomplishing what the legislature has failed to do; and while judges cannot directly control the behavior of police, they can powerfully influence that behavior by reversing convictions in instances where constitutionally required procedures have not been followed. By contrast, the factors contributing to racial balance are far less subject to judicial control. Even a school district seeking to implement a racial balance order has to reckon with those who by leaving vote with their feet, and in so doing produce racial imbalance. The judge can, in theory, compel compliance by holding responsible officials in contempt of court, and on rare occasions this power has been used. Contempt orders, of course, do not directly achieve compliance. They also risk conferring martyrdom on the resisters, thus making compliance with the court's desired outcome even harder to come by.

Thus, even a racial balance order cannot be readily achieved by unilateral and authoritative decision; this is even truer of the broader remedial orders which have more recently become commonplace. Courts depend for the effectuation of a remedy on the cooperation of the parties to the dispute. That dependency leads them to structure a political bargaining relationship, designed to achieve agreement between the parties. yet the bargaining process also differs significantly from run-of-the-mill politics. Permissible outcomes of the process are bounded by the judge's understanding of what is constitutionally permissible; it is not any agreement, but only an agreement consistent with the teachings of Brown and its progeny, that the court will approve. The judge himself may also hold views about the educational substance of a good outcome, quite apart from either the requirements of law or the preferences of the parties; if so, these are interjected into a bargaining process in which the court becomes not the presiding figure but a partisan, pressing its own sense of the public interest.

The desegregation cases thus reveal not a single mode of judicial behavior but a range of judicial stances. The legalist judge, persuaded that the elaboration of authoritative principles in the context of a particular fact situation fully describes the judicial task, will not enter into the political fray. For very different reasons, the judge motivated by particular educationist concerns may behave similarly, looking to the parties primarily for after-the-fact support. The mediator judge will stress agreement as the primary concern, assuming a relatively passive role. Greater judicial activism will occur when no consensus readily emerges from the bargaining. The court will of necessity find itself shaping political relationships, not taking the existing political configurations as given. In such circumstances, the court is likely to structure the bargaining process iteratively. The court's intention is to lead the parties to a resolution which is at once satisfactory to them and consistent with constitutional requirements. This is likely to entail the possibility that the court's decree will be modified in light of subsequent experience: the decree itself becomes a political document, not a final order, as amenable to adjustment as the political environment which produced it.

B. Politics, Desegregation, and the District Court

Appellate courts, themselves somewhat removed from the political give-and-take characteristic of much litigation and constrained by the imperatives of opinion-writing, rarely take explicit note of the politics surrounding judicial decision making. In the annals of desegregation litigation, Justice Powell's opinion in the Denver litigation stands as the conspicuous exception.[90] Powell rejected the prevailing legalism both with respect to wrong-finding and remedy-shaping. There is no need, Powell insisted, to show that segregation is deliberately caused in order to justify a court-ordered remedy; the equal protection clause, as Powell read it, imposed an affirmative obligation to operate "a genuinely integrated school system." That obligation did not, however, embody a command to do the impracticable. Desegregation, Powell argued, was a vital political objective, and as such properly weighed against "other, equally important educational interests which a community may legitimately assert." That was what equity entailed: "reason, flexibility, and balance." "It is time," Powell concluded, "to return to a more balanced evaluation of the recognized interests of our society in achieving desegregation with other educational and societal interests a society may legitimately assert."

Powell's opinion attracted no support on the Court, which in Denver and subsequent cases has increasingly retreated to legalisms of one sort or another. His perception has, however, prevailed in fact. The balancing of which Powell talks is characteristic of much desegregation litigation: given the bargained-over character of that litigation, it could hardly be otherwise.

The vitally political character of desegregation cases, and the consequently bounded authority of the judge, have long been clear to lower courts. More than a decade ago, the district judge in the Washington Parish, Louisiana case described the work of courts as "an attempt by civic- and social-minded judges to add legal precepts to the force of moral, social and political principles in the effort of the responsible sectors of our society to eradicate the divisive and ruinous prejudices between the citizens of this nation."[91] The court's contribution is, importantly, supplementary and not primary, hortatory and not directive. As the district court in the Lansing litigation declared, courts "cannot order people to be charitable to one another in their daily affairs. The law provides impetus, sets limits, corrects abuses--it is an external conscience. But the change of heart must come from within."[92]

This widely shared perception leads courts to urge compromise, in the belief that the real parties at interest, the general populace, will be more likely to accept agreement than respond to order. These urgings sometimes appear in the court's opinion. In Columbus, for instance, the court called upon the litigants to "come together and attempt to reach an amicable and fair resolution of the questions presented by the remedy phase of the lawsuit";[93] similarly, in Cleveland the court cites repeated requests for cooperation among the parties in shaping an acceptable outcome. More frequently, such comments are made from the bench or in chambers. In the San Francisco litigation, the court delayed questions of remedy for some months, pending the Supreme Court's decision in Swann. Judge Weigel expressed the hope that, during the interval, an acceptable plan could be produced without further court order. "I would very much prefer to have the Board. . . come up with a specific plan for the provision of equal educational opportunity [than to order such a plan]."[94]

Even among courts which have been rebuked for overreaching their authority, the early stages of the litigation are marked by attempts to mobilize support for a plan at once politically agreeable and constitutionally permissible. In Pasadena, Judge Real's insistence that a racial remedy remain in effect for his lifetime was reversed by the Supreme Court, which used the occasion to limit the scope of the trial judge's remedial discretion.[95] Quite by contrast, the first remedial order in the Pasadena case was couched in general terms and designed as a catalyst, to spur a desegregation planning process already well underway within the school district.[96] In Boston, Judge Garrity's decision to place South Boston High School in receivership is widely viewed as the most dramatic example of unilateral judicial action. Yet the Boston court had relied on a panel of masters, chosen with an eye to their political sensibility, to devise a workable plan for that city.[97] In general, these decisions do not speak of uncompromisable rights but rather concern themselves with divergence among interests, where some balancing is both legitimate and appropriate. The district court in the Springfield, Illinois decision goes so far as to define interest balancing as what the Constitution requires. "[W]hatever plan is most fair to all involved must be implemented. After all, this is what the Constitution is all about."[98] This is decidedly not what the Constitution is routinely thought to be about; not, at least, in the run of cases.

Urgings to get "something working," to "get people to reach a common ground," or to "collaborate"--very different from the language of adversarial relationships--are familiar; indeed, to some courts adversarial behavior is itself thought inappropriate, inconsistent with the task at hand.[99] Courts have opportunities at each stage of the litigation to spur this process. Some recognize the need to function differently from the run of cases. The Milwaukee court, for instance, describes desegregation issues as "polycentric problems [which] call for decisions using a managerial decision-making process."[100] Encouraging settlement has become increasingly commonplace: in Atlanta, Waterbury, and Milwaukee, agreement has been achieved; in St. Louis, settlement was upset on appeal by a group not party to the original litigation.

Judicial determinations concerning who is entitled to be heard in the litigation may be used to limit the bounds of the dispute. Decisions concerning would-be intervenors, while affected by federal rules of civil procedure, are, at the interstices, made with these considerations in view. Judges are, for example, often reluctant to permit fervent antibusing activists to intervene in the suit. This reluctance is nominally premised on the fact that the school district adequately represents their interests, a legalist concern. Yet other factors are also at work. The ideological character of these groups diminishes the prospects for agreement, and makes such participants generally unwelcome.[101] Similarly with respect to black intervenors who have sought to urge a remedy other than desegregation, such as community control: because they do not accept the basic premises of the litigation, such intervenors are likely to make settlement more difficult and thus to be unwanted. Bounding the lawsuit promotes the prospect of settlement--at least in the short run, among those with a judicially recognized interest.

Political considerations do affect the identification of who has a legally cognizable stake in the outcome of the case and what facts will be deemed relevant. It is, however, the phases of the litigation prior to the remedies' stage that legalist concerns retain their greatest importance. Fact finding and rule applying serves the important function of making the legal status of the parties clearer. This may affect both their perceptions of legal right and their bargaining power; it does not address the problem-solving aspects of the lawsuit.

Problem solving represents the task of the remedial phase of the litigation, and it is here that courts are afforded the greatest scope for political maneuver. If one conceives of the initiation of litigation as interrupting an ongoing political process, that process often resumes in the course of putting together a remedy acceptable to the parties and the court. Remedy framing is itself a process, not (as in the typical damages suit) a single occasion.[102] Often, this process involves the court and the litigant in a series of iterations: the court issues an order, notes the responses of the parties (who have been urged by the judge to narrow the scope of their differences), then tailors a further, usually more precise, subsequent order.

The court does not have in mind compliance with some pre-established remedy, the judge behaving much as a Socratically-inclined law professor in leading the parties to embrace the "right" answer. To the contrary: within the constraints set by the law, there is no single right answer. Thus, within the bounds of the individual case, as in the development of doctrine at the appellate level, the court's desire is to proceed incrementally, and this involves learning from the past. Artful dodging by appellate courts and avowedly tentative orders by trial judges serve much the same purpose. What the trial court wishes to achieve is less a good outcome than the inauguration of a decision-making apparatus which will continue even after the order is entered. It is in part for this reason that district courts in desegregation cases reluctantly cede jurisdiction: retaining jurisdiction over the case permits the court to help maintain both the political and constitutional integrity of the decisional process.

What has been described is just a mode of judicial behavior, whose specifics are altered by circumstances. Where the parties are in essential agreement even before the lawsuit is filed, the gentle application of legal norms may prompt agreement. In Minneapolis, for instance, the dispute between the parties actually centered not on the desirability of accomplishing desegregation but rather on when, and to what extent, desegregation should proceed; during the remedial phase of that suit, the court was able to encourage the parties to compromise their differences in a manner consistent with perceived constitutional requirements.[103] In St. Louis, despite a greater divergence in the parties' position, a strong desire to reach a brokered solution was made manifest by both parties; there, the court did little more than preside over and approve the consent order that issued from that bargaining (an order subsequently upset on appeal.)[104] In some instances, school boards have relied on courts to order them to do what they would like, but lack the political capacity, to accomplish on their own. In these cases, the nominally imposed remedy usually represents a solution agreed to by the parties and endorsed by the court.[105]

Elsewhere, the court's role has been more active. In Atlanta, the court relied first on a court-appointed citizens committee and subsequently on the parties to promote a settlement, in both instances shielding delicate negotiations from public scrutiny.[106] The Dallas judge identified by name outside groups which in its judgment ought to aid in the remedy-framing effort; it thus helped bring into being, and relied on the recommendations of, a group which might be said to represent the diverse interests of the Dallas citizenry.[107] In each of these cases, the court expressed its preference for negotiation over adversarial relations. The Dallas court scolded the partisans during the remedial phase of the suit for taking adversarial positions, and not keeping in mind the larger public interests at stake, a position quite at odds with usual understandings of litigation. The court sought instead to encourage the partisans to "find a solution"; the court would "adjust it to constitutional significances."[108] The Atlanta judge noted that "when people get in court, they fight. When they sit around a table and keep cool, they'll make a settlement. That's a primary opportunity these [citizens'] committees have."[109]

The court's preferences for a solution that is nonlegalist in nature also promotes settlement. Typically, this involves rejecting a formulaic racial balance remedy. "I'm not about to engage in an exercise in futility at great cost to everyone," stated Judge Meredith in St. Louis,[110] while in Indianapolis the court expressed its opposition to the "massive fruit basket" approach of relying exclusively on racial mix as adequate remedy.[111] In Atlanta, the court ruled out further racial mixing: "It is not possible for anything more to be imposed upon this city in the name of promoting integration without being self-defeating.[112] What was possible was for the parties to determine.

A view of remedy as itself a process also increases the likelihood of settlement. Judge Doyle noted that the Denver remedy "won't be too final. . . I think it's going to be temporary-final. . . . [I]t doesn't look to me like we're going to wrap this up in one fell swoop."[113] The plaintiffs in St. Louis explained that the evolving nature of the remedy approved by the court gave it especial appeal. "In some other areas, a bunch of experts have come in and decided what would be good. That's why we refused to put this ballgame together at once."[114] In Las Vegas, the trial court permitted a one-year trial of a free choice integration plan; only after it failed to achieve substantial integration was a more extensive plan put into effect. The court of appeals approved this step-by-step approach. "The present decree is the beginning, not the end, of the remedial process. No doubt it will be modified and adjusted in the light of progress made in the elimination of the effect of segregation."[115]

Those cases in which the court has appointed masters may represent the clearest instances of promoting a bargained-for remedy. The master is usually appointed after the parties themselves have failed to resolve the matter satisfactorily. He serves as an alternative mechanism for incorporating political considerations in the deliberations. Because the master is not a judge, he can engage in the kind of give-and-take among the parties that a court may find too time consuming or too inconsistent with its usual functions. In almost all of the cases in which masters have been relied on, they have sought, as the several masters in the Boston case put it, to "desegregate and defuse." In some places, of course, they have been more successful than in others. Even where the master's intervention does not directly promote settlement, it may have salutary effects. In the Coney Island case, for example, the master's report served as a political lightening rod, helping the court to identify a politically feasible solution.[116]

The typical practice in these cases of relying on the school district to prepare an initial remedy, in response to a quite broad court order, also encourages compromise among the parties. The practice is somewhat unusual: one does not normally ask the wrong-doer to set the terms of remedy. The conventional explanation makes note of the special expertise of the district, and the consequent appropriateness of drawing upon that expertise to provide practical guidance in solving the puzzles presented in remedy framing. To some extent, this explanation is a sensible one: a school district should know--or know better than anyone else--how to promote racial mixing with least disruption of neighborhoods, or which changes in pedagogical practice ought to accompany desegregation. But the argument fails fully to persuade. Insofar as remedy framing demands change from standard operating procedures, rejection of extant practices, the school district--which put those procedures and practices into place--may be the worst agency to assume responsibility for the job. The district may know well how the system presently runs, while lacking the perspective needed to determine how to alter it. Moreover, the district will likely seek to minimize change, to do as little as it has to in order to satisfy the court. This is not necessarily the case--some districts will seize the opportunity of remedy shaping to "impose" upon themselves innovations that they have long wanted to put in place--but where the urge to minimize prevails, the plan which emerges in response to the court order will be less good, by the criteria of rationality, than what an outside expert might produce.

Yet other hidden "goods" stem from reliance on the district, and these factors afford a further measure of justification for the practice. Reliance on the school district encourages negotiations between the parties. Sometimes, such interchange is expressly called for, as where plaintiffs are asked to participate jointly in planning; and in any event, the fact that plaintiffs as well as the court will comment on the district's proposal tacitly promotes the same end.

At this stage of the litigation, the district court may encourage the participation of a number of outsiders--citizens' groups, intervenors with a thin claim to involvement, representatives of minority viewpoints--not represented in earlier phases of the suit. Their participation turns the lawsuit into even more of a political forum. Because each of the parties to this process, including the judge, have something to gain from consensual (rather than imposed) resolution, a classic bargaining situation is set up. The district court in the Mongomery, Alabama, litigation (a suit which had been in court for well over a decade) described this process:

> This Court has often recognized the practical problems and administrative difficulties in a dual school system that had been closely tied to long established social patterns. A successful school system demands support from the community--both black and white. To facilitate this support, this Court has attempted to avoid imposing rigid or inflexible requirements on the board and, where possible, has allowed the parties to work out their own differences. . . .117

In the view of the Rockford, Illinois, district court, this is precisely what equitable remedy framing entails; it serves as "the instrument for nice adjustment and reconciliation between the public interest and private needs."[118] In a goodly number of cases, the courts attempted to enlist other government agencies in this enterprise. In U.S. v. State of Missouri[119] local school districts were required to cooperate in preparing a remedy. The trial court also permitted a sixteen-month delay, while state officials studied nine possible plans; a revised plan, submitted by the state, won eventual approval. The appeals court in U.S. v. Omaha ordered that the school district, plaintiffs, the state education department, and an interracial committee all participate in the enterprise.[120] The Coney Island court sought assistance from federal, state, and local housing agencies. In Indianapolis, Judge Dillin openly urged suburban school districts to participate in a rather modest busing plan: "If the suburban schools would accept 15 percent new minority students from the Indianapolis Public Schools, this would solve the problem, preserve their local autonomy, and end this case."[121] Before ordering a particular metropolitan remedy in that suit, the judge (himself a former state legislator) wrote to the Indiana legislature, frankly inviting that body to step in. The judge noted that federal courts are "reluctant to enter into the field unless required to do so by virtue of inaction on the part of the legislature. It seems appropriate to me to call these problems to your attention. . . ."[122] The remedial order in the Delaware suit was more directly drafted with legislative intervention in mind: the decree would not go into effect, the court declared, unless Delaware failed to propose its own plan.

In each of these instances, cooptation is what the court has in mind. A willing school board or state legislature is far less likely to attempt to subvert, or grudgingly to manage, a remedy than one on which the remedial burden has been unilaterally foisted. Thus, the court will willingly accept a remedy which is objectively "worse"--that is, less fully satisfies the Swann criteria--if that remedy both satisfies the minimum constitutional criteria and is acceptable to the government agency obliged to put it into effect. In the Los Angeles litigation, the California Supreme Court accorded this idea the sanctity of law; if school districts were making reasonable efforts to address questions of racial justice in the schools, as a matter of state law, trial courts were not to intervene--even if the judge imagined that a better plan could be conceived.[123] An adequate remedy, the California court suggests, entails more than a rational choice among plans, stripped of political and institutional context; the involvement of the school authorities is seen as an aspect of legal adequacy. In San Francisco, Judge Weigel permitted the school district to put its plan, rather than the NAACP plan, into effect for similar reasons:

> In [the court's] view, the fatal--if unavoidable defect of the [plaintiffs'] plan was the absence of substantial community involvement. . . . [B]ecause it was the NAACP's plan and not the board of education's, it was less likely to gain community political acceptance.[124]

Such a remedy-framing process assumes that the several parties to the dispute will cooperate. Where this turns out not to be the case, bargaining fails: there cannot be a bargain without bargainers. The civil rights groups rarely if ever refuse to enter the affray. School district or state agencies may decline to participate, either because their ideological commitments are seen as absolutes, claims of right and not defenses of an interest, or because they resist the court's assuming responsibility for bargain-shaping, seeing in that act an inappropriate combination of functions.

The case law illustrates these rationales for nonbargaining. In Boston and Denver, the court's request that the school district develop a plan consistent with broad guidelines evoked outright defiance in the former case, a sham effort in the other; without such collaboration, the court had to rely on school district conscripts and outside sources.[125] "The recalcitrance of the [Denver] school board and the school administration defendants. . . forced the judge to make an end-run around these defendants in both the foundation and implementation of the desegregation plans." As Judge Doyle observed:

> What I had in mind was that the parties would get together, and implement [my general] suggestions. . . . But this never did occur. The Supreme Court of the United States has repeatedly declared that it is the job of the school districts to desegregate, and I have to give them every opportunity to do so in order to comply with the law, and it is very plain now that. . . they are not going to, and so with the aid of the Court's consultant, a plan has been prepared. . . .126

When at a subsequent stage of the Denver litigation a more integration-minded board was elected, it was able to work with the plaintiffs on modification of the original order acceptable to the court. In Pasadena, the reverse occurred. Limited school board participation gave way in the face of ideologically-driven opposition to desegregation manifested in the second round of litigation by a subsequent school board. This transformation made compromise impossible. "A judge is not a proposer," stated Judge Real. "He can only take what they bring him."[127] What the district proposed was not an incremental adjustment of the court's order but wholesale abandonment of the extant remedy. The court could do little but deny that request. Defendants in litigation also sometimes fear that helping to plan a suitable remedy jeopardizes their capacity to oppose the propriety of ordering any remedy on appeal: in these situations, the confusion presented by the court acting variously as decision maker and mediator is a troubling one. Just such fears--coupled with what one observer described as "the pure raw politics of the situation"--inhibited legislative involvement in Delaware, and similar factors were apparently at work in the Indianapolis case.[128] Why, the political actors might ask, should we be doing the judge's work for him? And if the response is that this isn't the work of the judge, but rather properly the responsibility of a variety of government agencies, why should it be judicially mandated?

Appellate review limits the scope of bargaining in another way: it provides judicial oversight both of the wrong-finding and remedy-framing aspects of the suit. Even where the parties prefer a consensual remedy to one imposed by the court, the school district may well prefer no remedy; and if it appeals the decision with this end in view, plaintiffs are likely to counter by promoting their original remedial suggestions. Where this occurs, the bargaining falls apart. The possibility of its happening reveals the fragility of the bargaining enterprise: for it to succeed, all parties to the dispute must prefer implementation of the agreed-upon solution to any court order, whether that of the district or appellate court. Even in those instances, nonparties unhappy about the outcome may force appellate review. In several cases, including San Francisco, those who had been denied standing fully to intervene in the case successfully demanded a rehearing; elsewhere, intervenors displeased with the remedy, as in St. Louis and Atlanta, sought appellate review of the substance of the decision. In St. Louis, the consent agreement was overturned, and a trial ordered. Yet in the Atlanta case, the Fifth Circuit, for so many years in the forefront of efforts to hasten desegregation, approved a consent order which relied on changes at the teaching and administrative levels, rather than further student mixing. The court noted that, in Atlanta, a practical limit to reassignment may have been reached, and it recognized the importance of the fact of agreement between the parties to the dispute. The Atlanta decision reiterates the importanee of political as well as doctrinal decisions, even on the appellate level.[129]

The remedies judges actually order also reveal the bargaining process at work. The orders are very different, from one city to the next--as one would expect from a political undertaking.

It could be that those differences are best explained by noting terms of personal predilections of the judges. As the next section notes, judges' preferences do need to be taken into account; they are, though, far from the whole of the story.

For one thing, the decisions seem responsive to variations among the districts; community idiosyncracies are honored in the opinions. For another, judges who decide several desegregation cases reach quite different decisions. The judge who, in St. Louis, approved a consent decree involving no busing of students, had earlier ordered the merger of an all-black district with surrounding, largely white districts; the judge who had swiftly ordered desegregation in a rural Arkansas school district acted with greater reluctance in Little Rock.

Of greater moment, the orders generally demand less, in terms of racial mixing, than a strict application of the Swann-Keyes remedial standard might lead one to anticipate. Even before the Supreme Court began in Brinkman v. Gilligan to limit the scope of racial balance remedies, courts had sought other approaches for achieving a "unitary" school system. The Coney Island court, responding to a proposal of that school board, ordered a junior high school converted into a school for the gifted. The Dallas court, reacting to school district suggestions, utilized magnet schools as "the heart of the remedy." The Denver court responded to widely voiced community concerns about the demise of neighborhood, by ordering that students be bused only for a half day (this aspect of the decision was reversed on appeal). The order in Boston left whole sections of the city untouched by the busing aspects of the order. The Memphis court ordered a plan which struck "a balance" between "practicalities" and "constitutional requirements"; in the face of the parties' "extreme opposite positions," the court attempted its own balancing.[130] The San Francisco decision permitted the school district to manage its own plan, which promised less complete relief from racial isolation, over one proposed by the NAACP which offered more racial mixing at the price of less community involvement and support; this pattern has been followed in other school districts.

Within the relatively broad range of discretion left by the Supreme Court decisions, the outcomes of the cases have been quite distinct; and, in good part, that distinctiveness results from the workings of a constrained political process, managed by the court. The exercise of equity jurisdiction is supposed to result in idiosyncratic justice, results tailored to the particulars of the situation: to some considerable extent, this appears to be what has happened in desegregation litigation during the past decade. This outcome is, in part at least, traceable to the way in which judges have proceeded to resolve these controversies.

C. Educational Policy Concerns and the District Court

The decision making in these suits is not a wholly political task. As already discussed, legalist concerns constrain bargaining. The fact that desegregation cases are about education, rather than roads and sewers, has affected the bargaining process in yet another way. A great many people care passionately about education. Despite frequently heard disclaimers, a great many people--including judges--also have pretensions of expertise: we are all educational experts, after a fashion, if only because we have all been educated. This has led some judges to treat desegregation cases as affording a bully pulpit from which to excoriate present practices and propose new ones, quite apart from the views of the parties to the dispute: this involvement, where it occurs, collides with the understanding of remedy framing as involving either bargaining or law applying

After the Supreme Court had rejected a remedy linking Detroit with the surrounding suburban communities, the trial court was ordered to devise a Detroit-only cure for the racial wrong.[131] It is not just the scope of the remedy ordered which distinguishes Detroit. Although the sweep of the court's order impresses--including, as it does, provision of a new guidance program, a tougher student rights code, an in-service training program, establishment of an arm of the school bureaucracy to improve relations with the community, bilingual education, and a reform of the educational testing program--it is not unique. Other cities, among them Boston and Denver, have seen orders of similar sweep. What seems special is the way Judge De Mascio went about the task. The court undertook to mandate improved educational programs in lieu of greater racial mixing. The court asserted its unwillingness to treat "school children. . . as pigmented pawns to be shuffled about and counted solely to achieve an abstraction called 'racial mix.'"[132] In this, its concern was with educational benefits, not constitutional rights. This remedy did not emerge from negotiations between the parties. Quite the contrary: although Judge DeMascio shared the details of the plan with district officials prior to releasing his opinion, it was his plan, not the board's. Indeed, the amount of racial mixing ordered was less than the school board itself had proposed, the educational policy changes far more extensive than those dreamed of by the parties. "The court was as enthusiastic about revitalizing the educational process as it was reluctant to desegregate it."[133]

Other courts, while not so ambitious, have similarly been motivated by their own notions of sound educational policy. In several cases, concern about the capacity of the school system to provide decent schooling to anyone appears to sway the judge. In Cleveland, for instance, the court did involve both the parties as well as state and federal officials in the remedial aspects of the case. Its final order required both considerable racial mixing and new educational ventures. The school district had claimed that "pupil reassignment on any substantial scale would threaten the quality of education," but Judge Battisti was unmoved. Educational quality was a central concern to the court; but as Battisti wrote, Cleveland's school district could hardly be made any worse than the court found it:

> . . . the picture of managerial competence, financial soundness, and quality education painted by the defendants was nothing more than sheer fantasy. The Special Master's efforts to dig into the operations of the school system, at times rivaling Hercules' confrontation with the Augean stables, show a quite different picture. The administrative

> procedures for determining and implementing educational policies are formless. . . . The financial system has proved to be primitive. . . . The educational programs asserted to produce academic excellence have instead produced levels of performance by students low enough to be characterized by the Cleveland Plain Dealer as "scandalous."
>
> It is painfully clear that no amount of desegregation could harm this school system. It is the sincere hope and belief of the Court that when desegregation comes and the constitutional rights of plaintiffs are restored, the rights of all pupils and parents to administrative competence, financial stability, and academic excellence will also be restored. 134

Similarly in Boston, while the Court sought to draw the parties into the remedy-framing task, its decision--particularly those aspects of the decision which linked the school district to the areas universities, colleges, industries, and cultural institutions--went well beyond what the parties had in mind. That decision was intended as a prescription for excellence, in a district perceived as a shambles:

> Both Judge Garrity and his experts apparently believed that the quality of instruction in Boston Public Schools had been so poor for so long that a redistribution of resources would not guarantee the plaintiff class the equal protection they were entitled to under the law. In order to provide equal protection, the Judge and his experts believed it was necessary to upgrade the entire system of education in Boston.135

It may be that the approach of the Detroit, Cleveland, and Boston courts yields a remedy similar to that which a healthy political system would adopt if left to its own devices, that the court acted as it did in the face of a bankrupt political order, with the hope (as Judge Battisti put it) of "restor[ing]" a well functioning school district. Whether the court has any chance of achieving this end is, at best, uncertain. The educational dilemmas which Battisti notes are real enough; they have not readily responded to other sorts of ministrations, and there is no especial reason to think that the court--as distinguished from the court acting in tandem with the parties--can do much better. As Howard Kalodner, reviewing case studies of court-managed desegregation, has written: "In some instances courts have . . . attempted to improve the quality of schools, attempted to shift toward or away from vocational education, attempted to affect teachers' values and biases, but it is unlikely that these efforts will prove more than that there are real limits to the judicial function."[136]

The hope to improve educational quality is a theme regularly sounded in these opinions. Reasonably enough: the aspiration finds its echoes in Brown's encomia to education. But "quality" has proved a buzzword serviceable in a wide range of contexts. Sometimes, quality concerns are tied to the quest for a politically acceptable settlement; at other times, the judge speaks ex cathedra. Quality and desegregation are sometimes linked; elsewhere, they are seen as opposed, by courts reluctant to order racial mixing. The court in Houston declared that money which would otherwise support student busing "can be better spent in providing more and better teachers, newer and more efficient schools and other facilities than in increasing ever so slightly the Negro-to-white ratio in a few specific schools."[137] Throughout the Dallas litigation, the Dallas court stressed its preference for "quality education," which it defined as something "much more than a student assignment plan. . . . a total education plan.' The plan it ordered entailed little racial mix.[138]

Similar language is deployed to the very different end of promoting racial mix in a number of cases. In *U.S. v. School District 151 of Cook County*, for example, Judge Hoffman expresses a concern for the black student as "in grave danger of becoming another battered child, for just as physical abuse batters the body, so psychological injury [stemming from segregation] can battersthe personality."[139] The trial court in Pontiac similarly rationalizes the judicially-ordered hiring of a black assistant superintendent, whom the district claims it does not need. "I *think* it is good for the black children out there in terms of image. I *think* it is good for the white children out in Pontiac to see a black superintendent of schools." Adds the court: "We observe a generation of children being injured by an admittedly segregated school system--another generation receiving inferior skills and being deprived of the technical and intellectual skills that will enable them upon graduation to perform in significant positions competently and confidently."[140] Somehow, that statement of the black predicament is linked to hiring a black administrator.

Both sets of beliefs--the view that racial mixing will generate improved education, or the argument that quality education is better had without the disrupting effects of "massive" desegregation--constitute at least the basis for plausible policy argument. It is not their substance which is problematic, but rather the fact that these views are urged by courts, without either the legitimacy which resides in constitutional extrapolation or the quite different legitimacy which can emerge from the institutional interdependency of the parties. These statements deserve no especial respect; they are but a statement of what the good life might entail. While judges, like the rest of us, are entitled to hold views of those matters, whether they should be able to render those sentiments into legally binding statements is another and immensely more troubling matter.

V. CONCLUSION: THE POLITICIZATION OF EVERYTHING?

This essay advances a series of propositions about the development of law in desegregation cases:

(1) decision making with respect to desegregation is a process at once political and legalist in character;

(2) concerns for both political and legalist norms are manifest in doctrine-setting opinions, beginning with the two Brown decisions;

(3) these opinions focus attention on the remedy-framing aspects of the cases, not just as occasions for securing rights of the parties; remedy begets right, in an important sense.

(4) the district courts attempt to manage a political process, marked by bargaining between the parties; that process eschews authoritative order in favor of agreement; it frequently proceeds iteratively, with the judge setting increasingly specific benchmarks and the parties narrowing their differences;

(5) several factors constrain this bargaining:

(i) legal rule, manifested in the Supreme Court and circuit court opinions;

(ii) unwillingness of the parties to bargain over matters seen as ideological (or political) absolutes;

(iii) the judges' independently derived views of good educational policy, linked neither to the parties' wishes nor to constitutional doctrine;

(6) despite these constraints, bargaining "in the shadow of the law" may be the dominant mode of dispute resolution in desegregation cases; this in sharp contrast to the widely held view that partisans in these cases are unyielding in their positions, and therfore must be ordered to act.

These propositions are advanced as speculations, hunches deserving further exploration. While they deserve to be treated cautiously, thepropositions acquire greater plausibility in light of assessments of other institutional reform cases. Inquiries into judicial management of suits concerning conditions in mental hospitals and state prisons reveal a judicial stance which is, if anything, less hedged round by legalist concerns, more prone to rely on bargaining on the one hand, rational solutions urged by outside experts on the other.[141] These courts resemble conventional views of the judiciary even less than courts hearing desegregation cases.

Taken together, this empirical research is broadly confirming of the model of "public law" litigation sketched by Abram Chayes in his path-breaking article, "The Role of the Judge in Public Law Litigation."[142] For better or worse, the ways courts operate resemble in some respects the functioning of other political institutions. There are, of course, distinctions worth noting. Rational concerns are assertedly of greater importance, as are legal norms: that there invariably exists formal opinion whose reasoning is subject to inspection, is assurance of this. Moreover, unlike many political frays, decision will be had by the courts, even if ultimate resolution of the dispute is stayed by avoidance tactics. The judge also, with respect to elements of the process, makes "authoritative prescriptions," with greater frequency than legislators or administrators are capable of doing.

These differences are, to be sure, of substantial importance. Yet the overriding truth appears to be that courts are not so much lawgivers as shapers of the sort of enterprise that Charles Lindblom characterizes in _The Intelligence of Democracy_[143] as "mutual adjustment." Lindblom did not perceive courts in this way. The political universe he sketches conspicuously omits the judiciary, and Lindblom excludes from mutual adjustment circumstances involving a "nonpartisan" decision maker, one who assumes "_that there exists some knowable criteria acceptable to him and all the other decision makers that is sufficient, if applied, to govern adjustments among them; and. . . [therefore moves] toward coordination by a cooperative and deliberate search for and/or application of such criteria or by an appeal for adjudication to those who do so search and apply._"[144] Adjudication is, in this conception, what has elsewhere been termed a legalist undertaking, distinct from the give and take of mutual adjustment. That mutual adjustment now seems a helpful way to understand how courts work; it may point to a judicial system which has assumed new jobs, and does them in a new way. Another, quite different possibility, is that we have arrived at a new understanding of familiar judicial behavior. Is it the courts that have changed, or just our understanding of what they do?

The point can be made more broadly yet: for the pertinent lesson of social science scholarship in the 1970s may be summed as "the politicization of everything." The instances are legion. Administrative agencies, it has been presumed, enforce decisions through the development and application of legal rules. On closer inspection, this legal authority seems of little import, at least when compared to reliance on informal political pressure.[145] The possibilities of successful political behavior are, concededly, linked to the underlying legal structure--much as legalism underlies bargaining in desegregation cases. It is, however, politics and not rule enforcing which emerges as preeminent. Consider, by way of another instructive example, our understanding of the professions. In the familiar view, professionals claim autonomy over their specific field to set and enforce standards of competence, with respect to admission into and continuing membership in the profession. Yet with the insistence of an ever-growing number of groups that they be treated as professionals--that is, entitled to autonomy--the professionals' success seems more an act of political skill, assuring monopoly over an endeavor, than an objectively justifiable entitlement. Professionals want, in effect, a closed shop; the demand for deference is really a political statement.[146] So too with analysts and administrators, whose behavior in managing institutions was supposed to exemplify rationality and efficiency; the modern view of their activities, whether these involve budget making or program determinations, casts them in a significantly political role.[147] Even nonpartisanship is a form of politics. So too with the Catholic Church, professional basketball, the movie industry: those things which set them apart--divine inspiration, skill, creative genius--matter rather less, their political character rather more, than has been the case. Counter-examples are difficult to come by.

These are broad themes, superficially sketched here. They do suggest that the politicization of the judiciary--or of our understanding of the judiciary--has its counterparts in other aspects of the society. This politicization has noteworthy consequences, among them a general demystification of institutions to which, for varying reasons, we have paid homage. Neither the Church nor, very differently, the American pastime, make unthinking claims on our loyalty. So too with the courts: to the extent that the judiciary is increasingly perceived as a political agency--and the televised hearings concerning the doings on the California Supreme Court, the "leaks" of United States Supreme Court opinions, and Robert Woodword's inside examination of the Supreme Court's operation all contribute to this understanding--it cannot automatically rely on the traditional bases for support. Litigation remains, in the popular mind, a way to resolve conflicts through principled elaboration of authoritative norms--not a political venture. The courts have contributed to maintaining the old depiction: even as they act in a political setting, they emphasized unbroken links to past legalist behavior. Even as the court goads a political process, it speaks in terms of orders; even as it seeks to balance interests, it makes reference to rights; even as it orders relief that purports to be definitive, in actuality it provides only a counterweight to the balancing of interests carried out elsewhere in the political system.

One concern inheres to the legitimacy of what the courts are doing: even if the judiciary is doing well, should it be in this business at all?[148] Even, if one puts such concerns aside (recognizing, for example, the powers of the pragmatic, the acceptance of what works, within the broad ambit of the American political tradition), other issues remain. If courts are to hear institutional reform cases--and not to hear at least some of these cases, including desegregation suits, now seems unthinkable--some blurring of traditional distinctions between adjudication and political behavior, between courts and the other branches of government, is inevitable. The most serious problem resides in the gap between what courts are doing, and what they say they are doing. Their very support will, in the long run, depend on the capacity of judges to articulate an explanation of what they are doing with sufficient persuasion to attract the support previously reserved for another and quite different judicial function. Can the court be at once "political" and judicial? Can it mix adjudicatory and brokering functions? Can it do these things and still function as a recognizably judicial institution? The history of desegregation litigation squarely presents but scarcely resolves these central questions of judicial policy.

FOOTNOTES

1. 347 U.S. 483 (1954).

2. See, e.g., U.S. Commission on Civil Rights, Fulfilling the Letter and Spirit of the Law (Washington, D.C.: Government Printing Office, 1976); Charles Bullock, "Desegregating Urban Areas: Is It Worth It? Can It Be Done?" 84 School Review 431 (1976).

3. See, e.g., Leno Graglia, Disaster by Decree: The Supreme Court Decisions in Race and the Schools (Ithaca: Cornell University Press, 1976).

4. See, e.g., Raoul Berger, Government by Judiciary (Cambridge: Harvard University Press, 1977).

5. U.S. v. Butler 297 U.S. 1, 62 (1936).

6. 7 Harvard Law Review 129 (1893).

7. Wechsler, "Neutral Principles of Constitutional Law," 73 Harvard Law Review 1 (1959).

8. Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Indianapolis: Bobbs Merrill, 1962), p. 58.

9. Thomas Reed Powell, Vagaries and Varieties in Constitutional Interpretation 8 (New York: Columbia University Press, 1956), p.

10. Archibald Cox, The Role of the Supreme Court in American Government, (Oxford and New York: Oxford University Press, 1976), pp. 103-4, 108-9.

11. Hart, "Foreword: The Time Chart of the Justice," 73 Harvard Law Review 84, 99 (1959).

12. Theodore Lowi, The God of Liberalism: Ideology, Politics, and the Crisis of Public Authority (New York: Norton, 1969), p. 25.

13. L.K. Cohen, ed., The Legal Conscience--Selected Papers of Felix S. Cohen (New Haven: Yale University Press, 1960), p. 37.

14. Id. at 67.

15. Bickel, supra Note 8 at 80, summarizes this view. See also Arnold, "Professor Hart's Theology," 73 Harvard Law Review 1298 (1960).

16. Stuart Scheingold, The Politics of Rights (New Haven: Yale University Press, 1974). See also Judith Shklar, Legalism (Cambridge: Harvard University Press, 1964).

17. Martin Shapiro, Law and Politics in the Supreme Court (New York: Free Press of Glencoe, 1964), p. 31.

18. Bickel, supra Note 8 at 64.

19. Id. at 240.

20. John T. Noonan, Persons and Masks of the Law (New York: Farrar, Straus & Giroux, 1976).

21. See, e.g., Coons, "Approaches to Court Imposed Compromise--The Uses of Doubt and Reason," 58 N.W.U. L. Rev. 750 (1964); Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 Law and Society 95 (1974); Kenneth Dolbeare, Trial Courts in Urban Politics (New York: Wiley, 1967).

22. See generally Chayes, "The Role of the Judge in Public Law Litigation," 89 Harvard Law Review 1281 (1976); Note, "Implementation Problems in Institutional Reform Litigation," 91 Harvard Law Review 428 (1977); Diver, "The Judge as Political Power Broker," 65 Va.L.Rev. 43 (1979).

23. Cox, supra, Note 10 at 77.

24. See generally Owen Fiss, Injunctions (Mineola, New York: Foundation Press, 1972).

25. Chayes, supra Note 22 at 1298. The cases are collected in the authorities cited in Note 22.

26. Glazer, "Should Judges Administer Social Services?" 50 Public Interest 64, 67 (1978).

27. Donald Horowitz, The Courts and Social Policy (Washington, D.C.: Brookings Institution, 1977), pp. 22-56.

28. Alexander Bickel, The Supreme Court and the Idea of Progress (New York: Harper & Row, 1970), p. 175.

29. See Fuller, "The Forms and Limits of Adjudication," 92 Harvard L. Review 353 (1978).

30. For an example of such comparative analysis, see Michael Rebell & Arthur Bloch, Educational Policy-Making and the Courts (unpublished report to be prepared for National Institute of Education, 1979).

31. Robert Dahl, Democracy in the United States (New York: Random House, 1972), p. 201.

32. David L. Kirp, "Multitudes in the Valley of Indecision: The Desegregation of San Francisco's Schools," in Howard Kalodner and James Fishman, eds., Limits of Justice: The Courts' Role in School Desegregation (Cambridge, Mass.: Ballinger, 1978), p. 411 & 412.

33. Chayes, supra Note 22 at 1300.

34. Cox, supra Note 10 at 77.

35. Horowitz, supra Note 27 at 10.

36. Mishkin, "Federal Courts as State Reformers," 35 Washington and Lee Law Review 949, 950 (1978).

37. See Johnson, "The Constitution and the Federal District Judge," 54 Texas Law Review 903 (1976).

38. Note, "Implementation Problems in Institutional Reform Litigation," supra Note 22 at 429.

39. See Graglia, supra Note 3 at 105.

40. For a brief discussion of these cases, see David Kirp and Mark Yudof, Educational Policy and the Law (Berkeley: McCutchan, 1974), pp. 289-91. See generally Richard Kluger, Simple Justice (New York: Knopf, 1976).

41. Beiser, "Review of Richard Kluger's Simple Justice," 89 Harvard Law Review 1945, 1950 (1976).

42. J. Harvie Wilkinson III, From Brown to Bakke: The Supreme Court and School Integration (New York: Oxford University Press, 1979), p. 62.

43. 349 U.S. 294 (1955).

44. Cooper v. Aaron 358 U.S. 1 (1958).

45. See generally Wilkinson, supra Note 42; Jack W. Peltason, Fifty-Eight Lonely Men (Champaign-Urbana: University of Illinois Press, 1961).

46. U.S. v. Jefferson County Board of Education, 1372 F. 2d 836 (5tn Circuit, 1966); aff'd, 380 F. 2d 385 (Fifth Circuit, 1967) (en banc).

47. 391 U.S. 430 (1968).

48. 396 U.S. 19 (1969).

49. 402 U.S. 1 (1971).

50. See generally Gary Orfield, The Reconstruction of Southern Education (New York: Interscience Publishers, 1969).

51. 413 U.S. 189 (1973).

52. See, e.g., Dayton Board of Education v. Brinkman 433 U.S. 406 (1977). For a criticism of this approach, see Kirp, "School Desegregation and the Limits of Legalism," The Public Interest 47 (Spring 1977).

53. 433 U.S. 267 (1977).

54. Gary Orfield, Must We Bus? (Washington, D.C.: Brookings Institution, 1978), p. 27.

55. Marsh, "The Indianapolis Case: United States v. Board of School Commissions," in Howard Kalodner & James Fishman, eds., Limits of Justice: The Courts' Role in School Desegregation (Cambridge, Mass.: Ballinger, 1978), p. 309, 336.

56. 418 U.S. 717 (1974) (White, J., dissenting).

57. Wilkinson, supra Note 42 at 310.

58. Id. at 308.

59. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

60. Bickel, supra Note 28 at 134.

61. 269 F. Supp. 401, 517 (D.D.C. 1967).

62. U.S. v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

63. Karst and Horowitz, "Reitman v. Mulkey: A Telophase of Substantive Equal Protection," 1967 Sup. Ct. Rev. 39, 79.

64. 383 F. Supp. 769, 770 (E.D.N.Y. 1974).

65. Indianapolis Star, August 14, 1973.

66. Quoted in Kelly v. Metropolitan County Board of Education, Nashville, 479 F. 2d 810, 812 (1973).

67. Quoted in Marsh, supra Note 55, at 343, N. 24.

68. Id. at 328.

69. Quoted by Elliot Marseille, "Denver," in Judicial Management of School Desegregation Cases (unpublished report prepared for the National Institute of Education, 1979) at 31. In Hobson v. Hansen, 327 F.Supp. 884 (D.D.C. 1971), Judge Wright denied handicapped plaintiffs' motion to intervene; they subsequently filed a separate suit.

70. Amos v. Armstrong, 416 F. Supp. 1325, 1339 (E.D. Wisc. 1976).

71. Clark v. Board of Education, 328 F. Supp. 1205, 1217 (E.D. Ark. 1971).

72. Transcript, Civ. 68-1438-R., p. 419, Jan. 10, 1970. Cited in Feigenberg, "Pasadena," in David Kirp, Nancy Borow, Mitchell Feigenberg, Tim Gage, Elliot Marseille, and Dorothy Robyn, Judicial Management of School Desegregation Cases (unpublished report prepared for the National Institute of Education, 1979) (hereafter cited as Judicial Management).

73. See Marseille, "Denver," in Judicial Management, supra Note 72, at 22.

74. See generally Robyn, "Wilmington," in Judicial Management, supra Note 72.

75. Id. at 99.

76. Id. at 51.

77. Id. at 52.

78. Id. at 53-55.

79. Id. at 62.

80. Id. at 61-62.

81. Id. at 110.

82. Calhoun v. Cook, transcript of December 28, 1972 hearings at 42-43. Quoted in Borow, "Atlanta," in Judicial Management, supra Note 72.

83. See generally Robyn, "St. Louis," in Judicial Management, supra Note 72.

84. See Kirp, "Race, Politics, and the Courts: School Desegregation in San Francisco," 46 Harvard Educational Review 572 (1976); and Kirp, "Race, Schooling, and Interest Politics: The Oakland Story," School Review (August 1979).

85. See generally Paul Peterson, School Politics, Chicago Style (Chicago: University of Chicago Press, 1976).

86. See Kirp, "Race, Politics and the Courts," supra Note 84 at 583.

87. See generally Borow, "Minneapolis," in Judicial Management, supra Note 72.

88. Id. at 27.

89. Research concerning impact of judicial opinions often succumbs to this temptation. See, e.g., Stephen L. Wasby, et al, Desegregation from Brown to Alexander: An Exploration of Supreme Court Strategics (Carbondale, Ill.: Southern Illinois University Press, 1977); Theodore L. Becker and Malcolm M. Feeley, eds., The Impact of Supreme Court Decisions (New York: Oxford University Press, 1973).

90. Keyes v. School District #1, Denver, 413 U.S. 189, 217 (Powell, J., concurring in part and dissenting in part).

91. 276 F. Supp. 834, 846-7 (E.D.La. 1967).

92. NAACP v. Lansing Board of Education, 429 F. Supp. 583, 631 (W.D. Mich. 1976).

93. Penwick v. Columbus Board of Education, 429 F. Supp. 223, 266 (S.D. Ohio 1977).

94. Kirp, "Race, Politics, and the Courts," supra Note 84 at 588.

95. Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976).

96. See Feigenberg, "Pasadena," in Judicial Management, supra Note 72.

97. Smith, "Two Centuries and Twenty-Four Months: A Chronicle of the Struggle to Desegregate the Boston Public Schools," in Kalodner and Fishman, supra Note 55 at 25, 84-85.

98. McPherson v. School Dist. #186, Springfield, Illinois, Civ. 74-44, December 7, 1976, unpublished opinion.

99. Amos v. Board of School Directors of the City of Milwaukee, 408 F.Supp. 765 (E.D. Wis., 1976).

100. See Gage, "Dallas," in Judicial Management, supra Note 72.

101. See, e.g., Johnson v. San Francisco Unified School District, 339 F.Supp. 1315 (N.D. Cal. 1971), vac. and cause remanded 500 F.2d 349 (9th Cir. 1974); Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967); Crawford v. Board of Education of the City of Los Angeles, 17 C.3d 280; 130 Cal. Rptr. 724, 551 P.2d 28 (1976).

102. See, e.g., Goldstein, "A *Swann* Song for Remedies: Equitable Belief in the Burger Court," 13 *Harvard Civil Rights--Civil Liberties Law Review* 1 (1978).

103. See Borow, *supra* Note 87.

104. See Robyn, *supra* Note 83.

105. See, e.g., Borow, *supra* Note 87; compare Kirp, "Race, Politics, and the Courts," *supra* Note 84.

106. See Borow, "Atlanta," *Judicial Management*, *supra* Note 72.

107. See Gage, *supra* Note 100.

108. 1975 Trial Transcript, Volume 2, page 342.

109. Quoted in Atlanta *Constitution*, January 24, 1971, p. 1.

110. Quoted in Robyn, "Wilmington," in *Judicial Management*, *supra* Note 72 at 62.

111. 332 F. Supp. 655, 678 (S. D. Ind. 1971).

112. Atlanta *Constitution*, April 23, 1971, p.1.

113. See Marseille, "Denver," *Judicial Management*, *supra* Note 72 at 47.

114. Quoted in Robyn, "Wilmington," in *Judicial Management*, *supra* Note 72 at 29.

115. Kelly v. Guinn, 456 F.2d 100, 110 (9th Cir., 1972).

116. See Fishman, "The Limits of Remedial Power: Hart v. Community School Board 21," in Kalodner and Fishman, *supra* Note 55 at 115.

117. Cass v. Montgomery County Board of Education, 377 F.Supp. 123, 1127 (D. Ala. 1974).

118. 385 F.Supp. 803, footnote 35 at 824 (N.D.Ill., 1974).

119. 363 F.Supp. 739 (E.D. Missouri, 1973) mandate conformed to 388 F.Supp. 1058 (E.D. Missouri, 1975) aff'd in part, rev'd in part 515 F.2d 1365 (8th Cir. 1975) [appeal after remand 523 F.2d 889 (8th Cir. 1975)].

120. U.S. v. Omaha,521 F.2d 530 (8th Cir. 1975); remanded on other grounds, 433 U.S. 667 (1977).

121. Quoted in Marsh, supra Note 55 at 353.

122. Indianapolis Star, December 29, 1971.

123. Crawford v. Los Angeles Unified School District, 17 c.3d 280, 130 Cal. Rptr 724, 551 p.2d 28 (1976).

124. Kirp, "Race, Politics, and the Courts," supra Note 84 at 597.

125. See Marseille, "Denver," in Judicial Management, supra Note 72; and Smith, supra Note 97.

126. See Marseille, "Denver," in Judicial Management, supra Note 72 at 90-91.

127. Interview with Judge Real, cited in Feigenberg, supra Note 96.

128. See Robyn, "Wilmington," supra Note 74.

129. Calhoun v. Cook, 522 F.2d 717 (5th Cir. 1975).

130. Northcross v. Board of Education, Memphis City Schools, 341 F.Supp. 583 (597) (W.D. Tenn., 1972).

131. See generally Hain, "Sealing Off the City: School Desegregation in Detroit," in Kalodner and Fishman, supra Note 55 at 223.

132. Bradley v. Milliken, 402 F.Supp. 1096, 1101 (E.D. Mich. 1975).

133. Hain, supra Note 131 at 292.

134. Reed v. Rhodes, 455 F. Supp. 546, 569 (N.D. Ohio, E.D. 1978).

135. Greenblatt and McCann, "Courts, Desegregation and Education: A Look at Boston" (unpublished paper, Harvard Graduate School of Education, 1979).

136. Kalodner and Fishman, supra Note 55 at 23.

137. Ross v. Eckles, 317 F. Supp. 512, 515-6 (S.D. Texas 1970).

138. See Gage, "Dallas," in Judicial Management, supra Note 72, at 105-107.

139. 286 F. Supp. 786, 788 (N.D. Ill., 1968).

140. Davis v. School City of Pontiac, 474 F.2d 46, 48 (Kent, J. dissenting, citing Supp. App. 136-7).

141. See, e.g., M. Kay Harris and Dudley P. Spiller, Jr., After Decision: Implementation of Judicial Decrees in Correctional Settings (Washington, D.C.: Government Printing Office, 1977); Note, "The Wyatt Case, Implementation of a Judicial Decree Ordering Institutional Change," 84 Yale Law Journal 1338 (1975). See also Denvur, "Towards a Political Theory of Public Interest Litigation," 54 North Carolina Law Review 1133 (1976).

142. 89 Harvard Law Review 1281 (1976).

143. Charles Lindblom, The Intelligence of Democracy (New York: Free Press, 1965).

144. Id. at 28.

145. Paul Hill, Enforcement and Informal Pressure in the Management of Federal Categorical Programs in Education, The Rand Corporation, NN-10428 and HEW (1979). The importance of legal norms may depend in part on the task being performed. See Robert Kagan, Regulatory Justice (New York: Russell Sage, 1978).

146. See, e.g., Eliot Freidson, Professional Dominance: The Social Structure of Medical Care (Chicago: Aldine Publishing, 1970) and The Professions and Their Prospects (New York: Sage, 1977).

147. See, e.g., Aaron Wildavsky, Speaking Truth to Power (Boston: Little, Brown, 1979).

148. Among the recent treatments of the issue of legitimacy, as it relates to the institutional reform litigation, are Nagel, "Separation of Powers and the Scope of Federal Equitable Remedies," 30 Stanford Law Review 661 (1978); Alexander Bickel, The Morality of Consent (New Haven: Yale University Press, 1975; Frug, "The Judicial Powers of the Purse," 126 University of Pennsylvania Law Review 715 (1978).

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WILMINGTON

Dorothy Robyn

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Early History. Thomas Jefferson described Delaware, the first state to ratify the Constitution, as a diamond because, although small, it had great value. Despite its diminutive size, the second-smallest state has had a long, complex history that exhibits many of the major themes in the economic, social, and political development of the nation. Like the United States as a whole, this tiny border state has its own rural South and industrial North, accompanied by marked geographical, ethnic, and cultural differences.*/A

In 1638, Swedish colonists led by Peter Minuit landed at a spot that is now part of downtown Wilmington and built the first permanent European settlement in Delaware, Fort Christina.*/B

The Swedes expanded their settlement in 1654 by seizing a Dutch post, Fort Casimir (now New Castle), but the following year the Dutch defeated the Swedes and established the colony of New Netherlands.*/B

Next to rule the area were the English, who captured the Dutch colony in 1664. William Penn took possession in 1682, and the following year the territory was annexed to the province of Pennsylvania. Not until 1776 did Delaware become a separate state.*/B

---

*Paragraphs followed by an asterisk (*) have been quoted *verbatim* from the source designated by the alphabetical letter (see page for citations).

It was in 1802 that Eleuthère Irénée du Pont, a young French immigrant with a knowledge of chemistry, raised $36,000 to build a black powder mill on the Brandywine [Creek]. The mill began operating early in 1804, and E.I. du Pont de Nemours & Company soon became the nation's largest black powder producer.[*/B]

"The Company State". Today, the Wilmington area remains one of the country's leading industrial centers. However, the Brandywine's assorted mills have been replaced by modern plants, several of the early industries have gone the way of the carriage trade, and the employment emphasis has passed from blue-collar factory work to white-collar administration and research.[*/B]

Because of its liberal incorporation laws and low taxes, Delaware is technically home to many of the country's large corporations. Nearly one-third of the companies listed on the New York Stock Exchange are incorporated in Delaware.[1]

While the chemical industry is the largest in the area, employing more than 20 percent of the total labor force, other industries together account for at least as much employment. . . . Many of the industries have a technical base, and much of the work is of the white-collar variety. In the chemical industry, for example, only about one-third of the employees are production workers; two-thirds work in offices or laboratories. . . . [Wilmington] has more Ph.D.'s per capita than any of the country's ten largest cities.[*/B]

Du Pont, with annual revenues of more than $4 billion, clearly dominates this miniscule state, whose revenues are only about $300 million. And of course wealthy members of the Du Pont family--there are actually more than a thousand living Du Ponts--and corporate executives have a disproportionate say in what happens here. A few years ago, a group of Nader's Raiders wrote a book about Delaware called "The Company State"; while it stumbles over itself on occasion in its hurry to condemn the Du Ponts, its basic point--that the Du Ponts tend to run things--is not unsound.*/C

In 1974, Du Pont employed more than 25,000 of the state's 210,000-member workforce.[2] Only the state and local government combined, with 29,500 Delaware employees, surpassed Du Pont on this score.[3]

Geography and Population. Delaware is bordered by Maryland and Pennsylvania, and New Jersey is only a bridge away. Wilmington sits in the center of the eastern megalopolis: downtown Philadelphia is only an hour's drive (half-an-hour by train); New York and Washington, two hours by car. One-third of all the people in the United States live within three hundred miles of Wilmington.[4]

As the second-smallest state in terms of area, and the fifth least populous, Delaware is often the butt of jokes. "Candid Camera" once filmed a stunt with a uniformed official instructing motorists to turn their cars around because Delaware was "closed for the day." Television audiences watched the segment and howled at how readily the drivers accepted what they were told. Among Delawareans, there's an old saying that their state consists of three counties at low tide but at high tide, only two.

In many ways, Delaware is a microcosm of the United States. Kent and Sussex counties, downstate, are rural and southern in orientation. Their good soils and proximity to major population centers gave Delaware the third-highest gross income per farm in the country in 1970, first among states east of the Mississippi.[5] The largest city in southern Delaware is Dover, the state's capital, population 2,000. Dover most recently made national news when the bodies of the Jonestown victims were flown to an air force base there for identification.

To the north is urban, industrialized New Castle County, where 70 percent of the state's population live--most of them in the northernmost part of the county, encompassing Wilmington.[6] As with many metropolitan areas, in recent years Wilmington has lost population and wealth to its surrounding suburbs (see Table 1). Wilmington peaked around 1940 with a population of 112,000.[7] From 1950 to 1975, that figure dropped by over a third, to 76,654.[8] During the same period, suburban New Castle County grew by a factor of five, from 62,000 to 316,994.[9] (As a result, Wilmington's population as a proportion of state population dropped from 34.6 percent in 1950 to 13.3 percent in 1975.)[10]

MAP OF DELAWARE */D

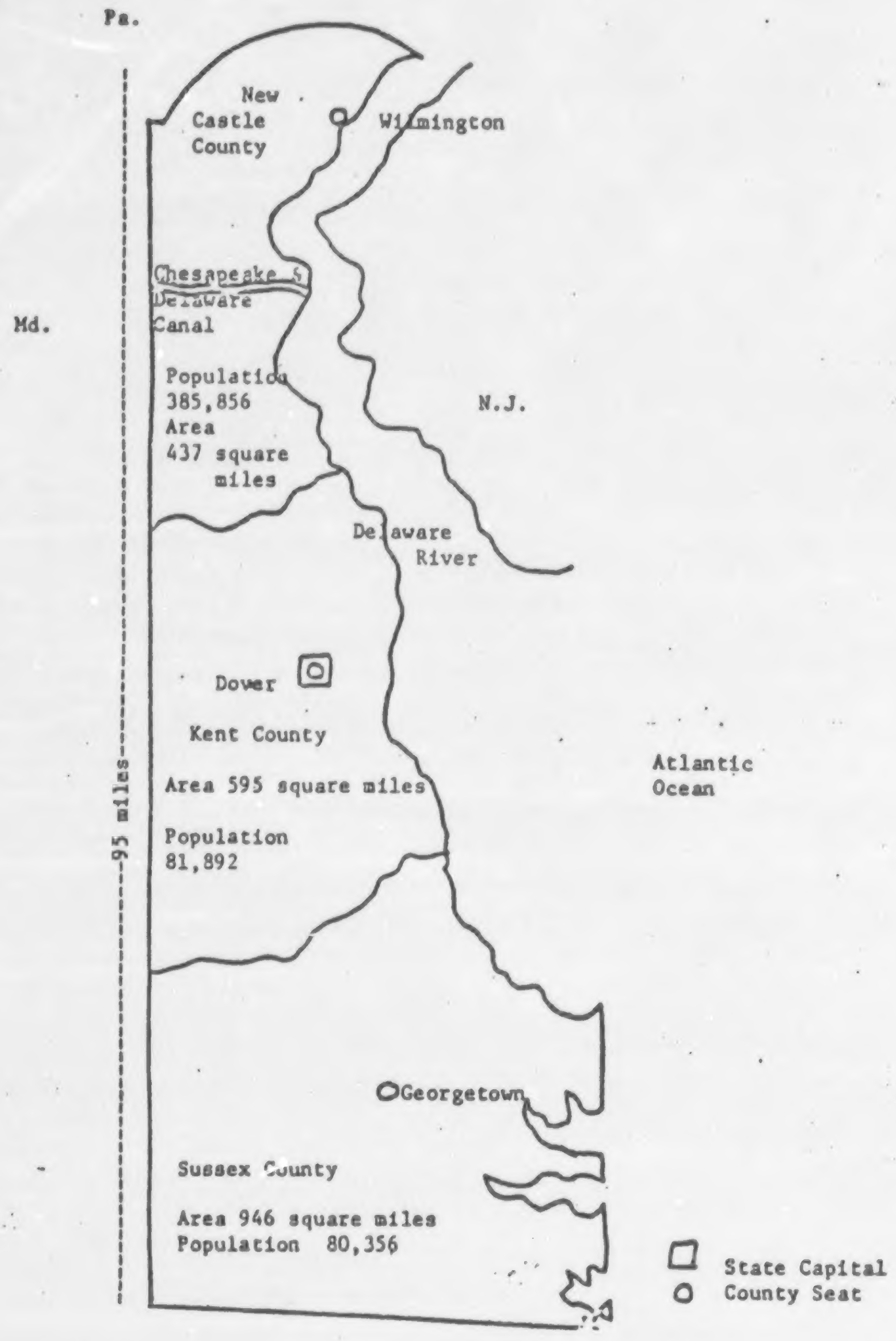
Pa.
Md.
New Castle County
Wilmington
Chesapeake & Delaware Canal
Population 385,856
Area 437 square miles
N.J.
Delaware River
Dover
Kent County
Area 595 square miles
Population 81,892
Atlantic Ocean
95 miles
Georgetown
Sussex County
Area 946 square miles
Population 80,356
State Capital
County Seat

TABLE 1*/D

POPULATION

	1950	1970	1975
Delaware	318,085	548,000	574,692
New Castle County (including Wilmington)	172,000	386,000	393,648
Wilmington	110,000	80,000	76,654
Suburban New Castle County	62,000	306,000	316,994
Wilmington Percentage of New Castle County	64.0%	20.7%	19.4%
Wilmington Percentage of Delaware	34.6%	14.6%	13.3%

BLACK POPULATION

New Castle County (including Wilmington)		12.7%	13.9%
Wilmington	[15%]**	43.6%	55.5%
Suburban New Castle County		4.5%	3.9%

** See n. 11 infra for source of this statistic.

The exodus to the suburbs was made up almost entirely of white, middle-class families. In 1950, Wilmington's population was only 15 percent black.[11] By 1975, the majority--55.5 percent--of city residents were black.[12] The color transformation in the city's schools was even more dramatic--from 28 percent black in 1954 to 84.7 percent in 1975.[13]

Politics. The politics of Delaware . . . has infrequently engaged the attention of writers. Technically, it has as much clout in the U.S. Senate as California or New York; in fact, Delaware has seldom produced important Senators. Over the years, the state has wavered between Democrats and Republicans, with the Du Ponts (the company owns the Wilmington newspapers, though it says it is trying to sell them) entrenched in both parties. In the 1960s, the Republicans seemed to gain a decisive edge, in large part because of their dominance of fast-growing suburban New Castle County, which cast 61 percent of the state's vote in 1972. Another factor was the increasing attachment of the Du Pont establishment to the Republicans; many top officials, most of them Republicans, hold public office while on leave from jobs with the company.[*/C]

Delaware's U.S. Senators have [in recent years become] strong antibusing activists in Washington. Both have introduced constitutional amendments and legislation to limit busing. Yet their personal styles and ideologies are quite distinct.[*/D]

Senator William Roth is a conservative Republican with ties to the wealthy segment of Delaware's population. Senator Roth has maintained a verbal and legislative barrage against busing. Roth has introduced legislation to give state courts remedial jurisdiction over desegregation, to appoint a national commission appointed by the President to study busing while implementation of all cases is delayed, and a constitutional amendment to prohibit the assignment of pupils according to race. Roth's opposition and activity are consistent with his general conservative and pro-suburban middle-class posture.*/D

Senator Joseph Biden has felt the political heat on the busing issue. Biden won a surprising victory in the 1972 election defeating [longtime] incumbent J. Caleb Boggs, an older and conservative former [Republican] governor of Delaware. Biden, a Democratic county councilman not yet 30 years old on election day, waged a vigorous campaign appealing to the old Democratic coalition of blacks, ethnics, labor, etc., but adding many middle-class suburbanites attracted to his youth, vigor, and outspokenness. In the Senate, Biden received immediate national attention and generally joined the Senate's liberal democratic wing.*/D

. . . . In September 1975, Biden introduced an amendment to limit the power of the Department of HEW to withhold federal funds where a locality would not agree to institute busing. The amendment had no effect on the Delaware situation, but it did signal Biden's decision to be a leader in the antibusing camp. Biden later said, "No one has done more to stop forced busing than Joe Biden."*/D

At the state level, three different governors have served since the desegregation suit began in 1971. Russell Peterson, a Republican, was defeated in 1972 by a former Democratic lieutenant governor, Sherman W. Tribbitt. Tribbitt served only one term before losing badly to Delaware's Republican Congressman-at-Large Pierre S. (Pete) Du Pont.

Where Democrat Governor Tribbitt's style was much like the Mayor Daley style of the traditional politician, slow and methodical, ad hoc, and with a strong emphasis on personal relationships, Republican Governor Du Pont's approach [is] more oriented toward planning, expertise, and management.*/D

Delaware state legislators enjoy noticeably less public respect than other elected officials. Many of the individuals interviewed in July about the Evans case described the General Assembly as "a joke" or a "disgrace to the state." At least up until the last election, Delaware had no lawyers in its legislature--a distinction shared by few if any other states. Instead, Dover lawmakers tend to be teachers and blue-collar workers. While the office of legislator offers little in the way of salary or prestige, that may be as much a result as a cause of the phenomenon. A better explanation may be that Du Pont and other corporations have preempted the traditional role of a state legislature.

Black Leadership. Black groups in Wilmington have historically been diffuse. Rival black politicians have feuded over control of the city's largely Democratic black constituency. At the same time, they've been coopted by the white-controlled city Democratic machine. According to one knowledgeable (white) observer, the problem is that "the calibre of black leadership stinks." In addition to lacking organizational ability, he said a number of them are "crooks"--involved in "typical city hall petty thievery." Nor have the traditional civil rights groups been a major force in Wilmington. This same authority described the local NAACP as "marginally effective," and said the Urban Coalition was "a joke."

Three years ago, the Coalition's major financial backer, the Du Pont Company, withdrew its support, citing lack of interest on the part of those the Coalition served. But after a long struggle for survival, in recent months ths group has shown signs of getting back on its feet. (The Delaware Equal Education Process [DEEP], was formed as an outgrowth of the Coalition in 1976 to promote peaceful desegregation. But DEEP faded away as it became clear that desegregation was not imminent.)[14]

Schools. Prior to the lawsuit described in the following pages, New Castle County was made up of the Wilmington School District and eleven suburban districts (see Table 2). All but one of the twelve were merged into a single district on June 30, 1978; nevertheless, the district names still describe distinct areas.

Bordering Wilmington on the north, in chateau country, are the three most prestigious suburban districts--Alexis I. du Pont, Alfred I. du Pont, and Mt. Pleasant. Students here typically come from families headed by professionals and Du Pont executives, and generally go on to college. West of Wilmington are the three predominantly middle-class areas of Marshallton McKean, Stanton, and Newark--composed largely of 1960's suburban developments. (Newark--pronounced New Ark--is the home of the University of Delaware, a 19,000-student institution best known, not surprisingly, for its chemistry and engineering departments.) To the south, New Castle-Gunning Bedford and Conrad, along with Claymont to the north, are predominantly working-class suburbs.

In contrast to these nine districts, none of which had more than a 6 percent black enrollment, De La Warr had a student population in 1976 just over 50 percent black (the residents are still majority white).[15] Isolated from Wilmington by physical barriers, and burdened with considerable tax exempt property, De La Warr has suffered from racial conflict, lack of funds, and high administrative turnover.

Finally, Appoquinimink, the single district excluded from the remedy, encompasses the southernmost, rural part of New Castle County. Like Delaware's downstate districts,

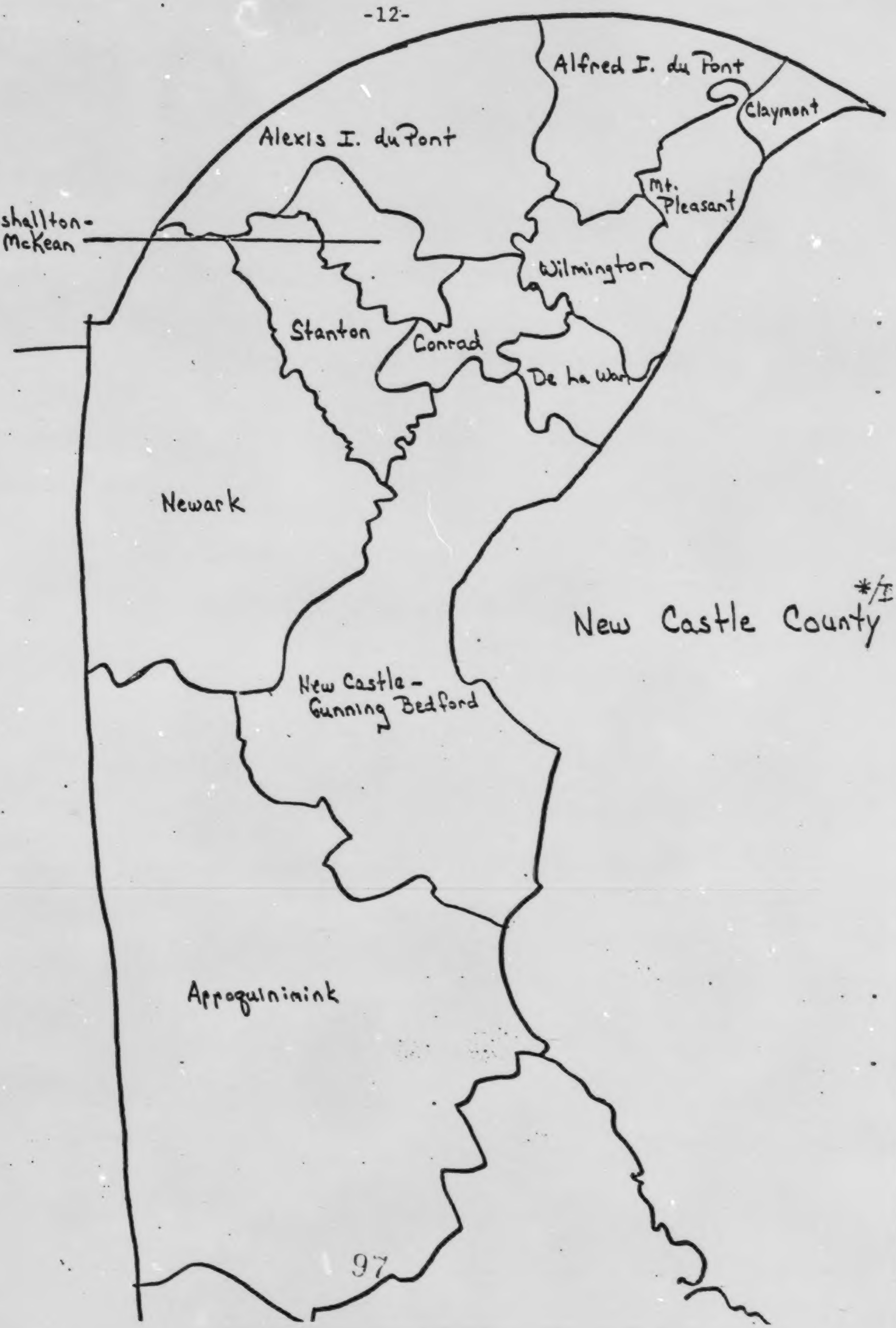
Alfred I. du Pont
Claymont
Alexis I. du Pont
Mt. Pleasant
Marshallton-McKean
Wilmington
Stanton
Conrad
De La Warr
Newark
New Castle County */I
New Castle-Gunning Bedford
Appoquinimink

TABLE 2 */D

1975-76 PUPIL ENROLLMENTS

School District	Percentage Black	Percentage White	Percentage Spanish / Oriental	Total
Alexis I. DuPont	3.9	93.8	2.3	3,258
Alfred I. DuPont	1.0	97.8	1.2	10,261
Appoquinimink	27.1	72.2	.7	2,401
Claymont	4.3	94.9	.8	3,306
Conrad	3.2	95.9	.9	5,334
De La Warr	54.9	43.9	1.2	3,172
Marshallton-McKean	4.8	94.9	.3	3,713
Mt. Pleasant	2.7	96.0	1.3	4,868
New Castle-Gunning Bedford	5.9	92.9	1.2	9,016
Newark	4.3	94.2	1.5	16,923
Stanton	.7	98.1	1.2	5,237
Wilmington	84.7	9.8	4.5	13,852
TOTAL	19.7	78.4	1.9	83,079

Source: Delaware State Department of Public Instruction, "Racial and Ethnic Report Pupil Enrollment: September 30, 1975," by Anne T. Jones, December 1975.

Appoquinimink was already integrated, with approximately 27 percent black students.[16]

These eleven suburban districts surround the Wilmington School District. Historically, Wilmington schools were considered the best in the state. The district, whose boundaries had been coterminous with the city's for more than sixty years, was wealthy and enjoyed special privileges--such as the right to certify its own teachers.

As Wilmington schools became increasingly black, their reputation declined, even though per pupil expenditures remained equal to that in the wealthiest suburban district, and city teachers were among the best paid in the nation. In 1973, Wilmington students performed the poorest of any in the county on a battery of standardized tests.[17] A poll conducted in 1977 showed that parents in both Wilmington and the suburbs perceived city schools as inferior to suburban schools.[18]

The Wilmington School District suffered from other problems as well in recent years. The high teachers' salaries came at the expense of intense conflict between union and school officials. Though Delaware law prohibits it, city teachers staged a bitter strike in 1975 that lasted for 28 days. In addition, the majority black Wilmington School Board has been plagued by racial conflict.

Prior to being dissolved by the court, the Wilmington School District was a major source of black leadership and pride. Whereas the city has a white mayor, and whites dominate the city council, the legislative delegation, and business and community organizations, blacks controlled the school district. Wilmington had had a black superintendent and a majority-black school board for almost a decade. Many of the district's administrative posts were filled by blacks.

In the 1960s, it was proposed that Wilmington be divided like a pie among suburban districts. Recognizing what this would do to their power base, city blacks opposed the idea vehemently. When five black parents filed the desegregation suit in 1971, the Wilmington School Board waited a year before agreeing to intervene. Throughout the suit, the board favored a remedy that would keep the Wilmington School District intact. Understandably, many blacks in Wilmington now wonder if "winning" the desegregation suit is not really a major political loss.

State Money, Local Control. The state authority responsible for public education in Delaware is the State Board of Education. The seven-member board is appointed by the governor. Six of the members serve for three-year terms; the president of the board serves at the pleasure of the governor.[19]

The state foots most of the bill for public education. A few decades ago, the state provided 90 percent of the money for local schools.[20] Today, it supplies 70 percent,[21] still the highest in the nation except for Hawaii, which is one large school district. (This expenditure represents over one-third of the state's budget.) Federal funds account for 8 percent; local districts provide 22 percent.[22]

Despite its role as chief education financer, the state offers little policy direction or control. Rather, the State board, and the Department of Public Instruction (DPI) under it, defer to local school boards and superintendents.

There are a number of reasons for local domination. First, local control has been a dominant theme of public education for the history of the nation. This is reinforced by the small size of the state; superintendents and school board members and their constituents have no trouble reaching the local legislator to complain about state "interference." . . . Third, state DPI officials have local school district, nonurban backgrounds. The state superintendent is a former superintendent of a rural school district in Delaware and the President of the State Board was the head of the Newark board. Thus locally oriented school people are in power at the state level. To further reinforce this orientation the legislature recently required that at least four members of the State Board of Education be former or current local board members.*/D

In New Castle County, the DPI is often viewed as a minor annoyance; it is rarely viewed as a help or as a strong directing force. Major initiat[ives] taken at the state level (e.g., Educational Assessment, Competency Based Education) tend to be modified and watered down by local forces. To some extent the view of DPI as inadequate results from large districts thinking they can do sophisticated tasks on their own and smaller districts being unconcerned with elaborate programs.*/D

The result (and perhaps a partial cause) of this local control is the great diversity of local school districts and the great influence of local superintendents on the style of the local districts.*/D

The best illustration of [superintendents' influence] is their salaries. Superintendents in three of the eleven districts [included in the Evans remedy] had salaries greater than $50,000 in 1977 and four [more] were greater than $40,000. These salaries are comparable to those given the superintendents of large school districts with more than ten times as many students. Furthermore [in 1977] sixteen county school officials earn[ed] more than the Governor's $35,000 salary.*/D

Local School Finance. [A]s illustrated on[Table 3], [prior to the Evans remedy], the desegregation area [had] eleven different per pupil tax bases. The predominantly white district of Alexis I. ha[d] a $70,594 per pupil tax base, over three times that of De La Warr and over twice that of seven other districts. In addition, there [were] eleven separate local per pupil expenditure rates varying from $724.10 to a low of $262.92, with the local per pupil expenditure of two districts (predominantly black Wilmington and predominantly white Alexis I.) being roughly two-and-one-half times that of the two lowest districts (predominantly black De La Warr and predominantly white New Castle-Gunning Bedford). Further, as denoted on[Table 3], there [were] eleven widely varying tax rates so disparate that the highest tax rate (predominantly black Wilmington) [was] three times greater than that of four of the districts and more than double most of the other districts. The enormity of the disparity is further highlighted by realizing that Alexis I., with one of the lower tax rates, produce[d] the second highest per pupil local supplement, only some $6 behind Wilmington. */E

Segregation in Delaware. Kluger has written, "In spirit if not in law, Delaware was a southern state, though it took the Union's side in the Civil War." Only a small portion of the state lies north of the Mason-Dixon line; Kent and Sussex counties, once slaveholding territory, have yielded major influence in the years when reapportionment and industrialization were minor forces in the nation. Thus, it is not surprising to learn that the Delaware Constitution, enacted in 1897, a year after Plessy v. Ferguson, called for separate school systems for Negroes and Whites. In fact, in 1919 it required that Moors [and] Indians also attend distinct schools.*/D

Even the most liberal community in Delaware--Wilmington--remained a Jim Crow town in 1950, observes Kluger, who concludes that Delaware was a most inhospitable place for Negroes:

> All the public schools were segregated, not just the grammar schools. There were no black nurses in the white hospitals, and not nearly enough hospital beds were available to Negroes, who made up 14 percent of the state's population. There were no black clerks in the banks or retail stores. Restaurants and movie theaters and hotels in downtown Wilmington were

> strictly segregated, and no black man served in the Delaware National Guard. The state college for colored people at Dover was not nationally accredited, and nothing approaching equal protection of the laws was practiced in any walk of life throughout the state, which functioned as a fossilized racist encampment on the traditionally white-supremacist Eastern Shore Peninsula.*/D

Schools for Negroes were underfinanced through a tax on property owned by Negroes; whites could attend schools for twice as many months. Only a gift by Pierre S. Du Pont (the contribution was approximately $2.6 million) in 1929-31 altered this bleak picture by providing resources to construct 87 school houses for Negroes by 1930. Educational quality for Negroes in Delaware remained dismal as Delaware approached the decades of the Warren Court:

> Despite the massive gains of the black schools, there were still two racially separate systems of education in Delaware by 1950. In that year, there were over 50 black school districts, overwhelmingly one-room affairs. By 1950, a black could receive a twelfth grade education only at Wilmington's Howard High School and Dover's Delaware State College preparatory department. There was no four-year secondary school in Sussex County until 1952, when William Jason High School opened. As late as 1953, the state provided no funds for black transportation, and blacks were not allowed to share white buses under any condition.*/D

The Origins of Evans v. Buchanan. The Wilmington school desegregation case really began in 1951 when black parents living in Claymont and Hockessin--communities on the outskirts of Wilmington--sought to have their children admitted to nearby all-white public schools. At the time, Claymont blacks of high school age had to travel to Wilmington's Howard High School. A black living in Hockessin couldn't attend the white school closest by, nor would the state provide transportation to the run-down one-room "colored school" two miles away.[23]

The parents went to Louis L. Redding, the first, and for many years the only, black attorney in Delaware.[24] Together with the local NAACP, Redding filed suit on the parents' behalf in the court of chancery. Chancellor Collins J. Seitz, after making a personal visit to the schools in question, ruled on April 1, 1952 that the facilities provided for blacks were not equal to those offered to white students. Seitz' ruling (Gebhart v. Belton), upheld by the Delaware Supreme Court, marked the first time that a court had ordered a segregated public school in the United States to admit blacks.[25] (A ruling two years earlier by Seitz had made the University of Delaware the country's first state-supported undergraduate institution to be desegregated by court order.)

The integration of Claymont and Hockessin took place peacefully overall. Meanwhile, the State appealed Gebhart to the U.S. Supreme Court where it became one of the four cases decided in the landmark Brown v. Board of Education.

In the aftermath of Brown, a number of suits were instituted against the state of Delaware to try and speed the desegregation process. Evans v. Buchanan, filed in 1956 by black parents in a rural school district in Kent County, was just such an action. Additional plaintiffs from other districts in Kent and Sussex counties subsequently intervened, and the case proceeded as a class action involving the entire state.[26]

The U.S. District Court found that no appreciable steps had been taken to comply with Brown, and granted summary judgment against the State Board of Education, the Superintendent of Public Instruction, and various individual districts.[27] The court directed the state board to submit a plan of desegregation for Fall 1957. In compliance with the decision, affirmed by the U.S. Third Circuit Court of Appeals,[28] the state board submitted a plan for grade-by-grade desegregation, to take place over a period of twelve years. The district court approved the plan with certain modifications;[29] however, the Third Circuit ruled that the plan failed to desegregate with sufficient speed, and ordered the board to develop a modified plan providing for full integration beginning Fall 1961.[30] In 1961, District Court Judge Caleb M. Wright approved with modifications the revised plan submitted by the state board.[31]

Among other things, the revised plan called for the board to propose to the Delaware General Assembly a new school code--including provisions for consolidating school districts. Independent of desegregation, the state board had long favored consolidation of some of the numerous small school districts--particularly in downstate Delaware--which it regarded as being inefficient. Bills to bring about such consolidation were submitted to the General Assembly in 1961 and 1963, but no legislation resulted. In 1965, the board waged a serious effort to achieve the necessary legislation; this culminated in 1968, when the General Assembly passed the Educational Advancement Act (EAA).[32]

State officials did not consider asking the district court, which retained jurisdiction in Evans, to review the EAA, since they regarded the transition to unitary districts as having been completed by 1967.[33] In fact, a letter from U.S. HEW officials that same year commended Delaware as the first southern or border state to have erradicated its dual system of public schools.[34]

The Educational Advancement Act. Delaware law has historically required that consolidation of contiguous school districts be approved by popular referendum in each of the districts affected. The key feature of the EAA provided a one-year exemption from that requirement--and in its place granted the state board authority to consolidate districts on the basis of administrative wisdom and certain criteria stated in the Act, among them that existing districts not be subdivided, and that consolidated districts contain no more than 12,000 pupils.[35]

The 12,000-pupil maximum specified in the Act implicitly precluded any consolidation with the Wilmington School District, which had an enrollment of 15,026 at the time. Another provision explicitly provided for the same result; it retained the 1905 portion of state law making Wilmington city and school district boundaries coterminous. This seeming "overkill" reflected the state board's fear that, without the explicit provision, the Act could be construed as amending Wilmington's City Charter--action which would require a two-thirds vote of each house of the General Assembly.[36]

Wilmington legislators--both black and white--unanimously supported the Act. They testified later that they had opposed those provisions which prevented Wilmington's consolidation.[37] But other indications were that the city's representatives were reluctant to forego any of the special treatment historically afforded to the Wilmington School District because of its coterminous relationship to the city.[38]

Evans Rekindled. Following the district court's approval of the state's desegregation plan in 1961, Evans was effectively dormant for ten years. (The only activity was a 1962 ruling against the state board and a local school board concerning the drawing of attendance areas.[39]) Then in July 1971, five parents of Wilmington school children reopened the case. In a three-part complaint against the state board and the State Superintendent of Public Instruction, the parents contended that a racially discriminatory dual public school system existed in New Castle County, including Wilmington; that the EAA of 1968 unconstitutionally confined Wilmington students to schools within the city limits; and that state policies had furthered public and private discrimination resulting in segregated schools.[40]

The way in which the 1971 suit came about has stayed something of a mystery. However, research currently being done by a graduate student in political science at the University of Delaware, Julie Schmidt, indicates the following:[41]

Wilmington blacks were not initially instrumental in reopening Evans. The moving force was a group of white, predominantly Jewish, longtime city residents who were less interested in desegregation than in having the boundary lines for the Wilmington School District extended outside the city's borders. They had witnessed the schools decline and property taxes go up as Wilmington became increasingly black and poor; expanding the city school district would enable their children to attend suburban schools, not to mention the effect on property taxes. These white residents felt that a challenge to the existing boundary lines might be successful in the courts for several reasons. Historically, the city and suburban school districts had bused students across those boundaries to accommodate the dual system of schools. Moreover, Delaware had recently undergone a major reapportionment which involved the grouping of certain city and suburban legislative districts.

The group of whites told the ACLU of its interest in filing suit, and the ACLU called a biracial meeting to discuss the idea. Blacks who attended responded with suspicion and hostility--an understandable reaction given that the largely black-controlled Wilmington School District represented that group's strongest foothold in the city's power base. ACLU attorneys were responsible for transforming the white residents' proposal--filing a suit to have the school district boundaries extended--into the notion of a desegregation suit. Through a series of community meetings, the idea spread. Five black parents, two of them city teachers, eventually agreed to be plaintiffs; they felt that suburban children were getting a better education than city pupils, and that an integrated educational experience would be beneficial.

The parents filed suit--Louis Redding was again the attorney--in July 1971. In June 1972, the Wilmington School Board voted to intervene as a plaintiff. That the board delayed joining the suit for almost a year reflected the black community's divided feelings about the suit. That it joined at all was due to the presence of a new superintendent committed to desegregation, and advice from the ACLU and others that by intervening, the board would be given some say in the remedy. In addition, HEW had in 1971 notified the Wilmington board that because of its maintenance of racially identifiable schools the district was out of compliance with Brown. The then-superintendent of the Wilmington schools believed that scattering out the few whites left in city schools would only speed their exodus to the suburbs; he convinced HEW to delay action pending a ruling in the recently-filed desegregation suit. Nevertheless, this "pressure" from HEW may have figured in the Wilmington board's decision to intervene.

In mid-1973, at the ACLU's recommendation, the Wilmington board hired Louis Lucas as its attorney. At the time, Lucas was a plaintiffs' attorney in the Richmond, Virginia school desegregation case. The Richmond case paralled Evans in several respects; in fact, some of the delay in bringing Evans to trial came about because it was thought that Richmond might be dispositive.[42]

Meanwhile, the state was soliciting prominent Wilmington attorneys to serve as special counsel to the state board. Most of the law firms contacted had some conflict of interest; one didn't, and in August 1973, William Prickett, of Prickett, Ward, Burt & Sanders, was named Special Counsel.[43] Almost immediately, the state began getting pressure to hire an attorney with a national reputation. In September, citizens jammed the attorney general's office to demand that the state hire Philip B. Kurland, the University of Chicago constitutional law expert who opposed Lucas in the Richmond case.[44] State officials resisted initially, but eventually hired Kurland.

As the trial date approached, several parties joined as amici: for the plaintiffs, the Urban Coalition; for the defendants, the Delaware School Boards Association. The NAACP, which in August had announced that it would file as an intervening plaintiff, later said that such a step would risk "further judicial delay," and decided instead to take a sideline role.[45]

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The Evans Court. Since Evans challenged the constitutionality of a state law, the case was heard by a three-judge panel: Caleb Wright, who signed the 1961 order mandating immediate desegregation of Delaware public schools; Caleb Layton, like Wright a Republican from downstate Delaware; and John Gibbons, a member of the U.S. Third Circuit Court of Appeals.

The following profiles of the three men are exerpted from the Wilmington Evening Journal, May 20, 1976:

Gibbons

> Presiding Judge John J. Gibbons, 51, is the most controversial and, to Delawareans, the least known of the three judges handling the desegregation case. He also is the most liberal.
>
> Gibbons was assigned to the case from the U.S. Third Circuit Court of Appeals, to which former President Richard M. Nixon appointed him in January 1970.
>
> Gibbons is a native of Newark, N.J. He grew up in suburban Belleville, a modest community, and attended St. Benedict's Prep, a Catholic high school favored by blue-collar families.
>
> After serving as a Navy officer during World War II, he earned degrees from the College of the Holy Cross, Worcester, Mass., in 1947 and Harvard Law School in 1950, working on the prestigious Harvard Law Review for two years. Graduating from both schools a few years before Gibbons was W. Arthur Garrity Jr., the U.S. District Court judge who is handling the Boston desegregation case.
>
> After Harvard, Gibbons practiced law in Newark, becoming a partner in a major firm which specialized in commercial law, particularly the corporate and bankruptcy fields.

He was president of the New Jersey Bar Association in 1967-68, when he also served on a special state commission investigating the 1967 Newark riots.

That experience, one of Gibbons' associates recalls, sensitized the judge to the social, economic and educational problems troubling urban areas. The commission's report called for a major overhaul in the greater Newark environment.

Gibbons is married and has seven children. The seventh, adopted a few years ago, is of Spanish-speaking ancestry. The judge and his family now live in Short Hills, an exclusive Essex County community.

In 1970, he described himself as a "below-average golfer and an avid reader," but those who know him today say he doesn't have much time for golf. Gibbons has been teaching part-time for several years at the Seton Hall University law school, where an associate said the judge admitted the Wilmington case "has put him way behind on his reading."

Gibbons has a summer home on Cape Cod, but Mike Giffenger, a former law partner, says the judge's passion for the law is so great, he often spends much of his vacation time doing research in the Harvard Law Library.

Regular readers of Gibbons' rulings say they are thoughtful and provocative. Associates consider him liberal and "socially conscious" but some hesitate to label him a "social reformer," a tag some Wilmington courtroom critics placed on him.

One of Gibbons' most controversial rulings came in the case of Edgar Smith, who spent 14 years on Death Row in New Jersey.

Gibbons, on the bench for less than 18 months, ruled that Smith, convicted of murdering a high school cheerleader, had been denied a fair trial because an unsigned confession, which formed a major part of the prosecution case, was illegally obtained and not admissible as evidence. Smith's case had bounced through state and federal courts until Gibbons ordered a new trial. While in prison, the high school dropout wrote a book, "Brief Against Death," and was befriended by conservative columnist William F. Buckley Jr. Smith then pleaded no contest to a lesser charge and was given a suspended sentence and placed on probation.

Gibbons is "moderate" but fair, according to one New Jersey reporter familiar with federal courts. A good friend says the judge is "shy," and a man "who eats, drinks and sleeps the law."

Wright

When Caleb M. Wright's name was first proposed for a vacancy on U.S. District Court, attorneys in New Castle County were stunned. It wasn't anything personal, but Wright's backer, former U.S. Sen. John J. Williams, was to explain that the upstaters "don't believe there can be a good lawyer south of the canal."

Williams went on to submit Wright's name to the late President Dwight D. Eisenhower and Wright was sworn in on Aug. 4, 1955.

On the bench, Wright, 67, presents an owlish appearance, his alertness and attention to detail hidden behind a weathered face that gives the impression of weariness. Above all, Wright is known as a gentleman, a judge who attorneys say has never been known to embarrass a lawyer. In fact, one attorney recalls Wright angrily phoning one of his partners and then calling back moments later to apologize.

The early opposition to Wright among New Castle County attorneys has disappeared. "They just didn't know him," recalls downstater James M. Tunnell Jr., a former state Supreme Court justice who now practices law in Wilmington.

Wright, the son of a respected local magistrate, was born in Georgetown and graduated from Georgetown High School in 1926. A graduate of the University of Delaware and Yale Law School, he practiced law in Georgetown through 1955, taking out four years as a deputy state attorney general and two years working with the General Assembly.

Wright once was chairman of the Delaware State College trustees, quitting that post in 1949 after former Gov. Elbert N. Carvel delayed okaying a bond issue for the college until Wright acted to fire the college president. Even though he did not favor the president, Wright refused to bow to the pressure.

While serving in District Court, Wright signed the 1961 order that required immediate desegregation of Delaware public schools and gave the court continuing jurisdiction. It was this order that provided the basis for much of the argument in the current suit.

Regular readers of Wright's opinions find them hard to characterize, but generally well done, moderate and fair. "He once seemed conservative, but some of his decisions in the last few years have been more liberal," one Wright-watcher said.

"He picks up the subleties of a case, what is not said as well as what is said," notes one attorney who has tried several cases before Wright. His opinions are carefully written, the attorney adds, "and very tough to appeal."

One attorney said most local lawyers consider Wright "an impeccable gentleman." His neighbors in Wilmington's Highlands area say the judge is fond of children and regularly lets youngsters other than his grandchildren play in his yard. At parties, his friends say, the judge thrives on conversations with younger guests.

Wright also has shown unique skill in selecting law clerks, often hiring those who followed him to Yale. His clerks have included U.S. District Court Judge Murray M. Schwartz, Yale Law professor Ralph K. Winter and Stanley Sporkin, head of the enforcement section of the U.S. Securities and Exchange Commission.

Layton

Caleb Rodney Layton III, as his name suggests, is a Sussex County patrician.

The Layton family arrived in Delaware about 275 years ago, from southern England via New Hampshire and Virginia.

The judge, born July 4, 1907, is the son of Daniel J. Layton, a former chief justice of the state Supreme Court. His grandfather was a physician, newspaper editor and congressman. Going back two more generations, the family tree includes Gov. Caleb Rodney for whom the judge is named.

Genealogy isn't the most important factor in Layton's life, but the family tradition is steeped in politics and law. Laytons have been attorneys in Delaware for nearly two centuries, and a 1945 biography described the judge as a "staunch Republican."

Like Judge Wright, Layton attended public schools in Georgetown, before graduating from Phillips Andover Academy, Princeton University and the University of Pennsylvania Law School.

Layton, who now lives in Westover Hills, practiced law in Georgetown from 1933 to 1936, then moved to Wilmington. He continued as an attorney through December 1947, when he was appointed an associate judge of the Delaware Superior Court and resident judge for New Castle County.

In December 1955, Gov. J. Caleb Boggs tried promoting Layton to presiding judge of Superior Court, but that nomination was victimized by the same sort of upstate-downstate and partisan split that nearly cost Wright his nomination to U.S. District Court four months earlier.

The nomination stalled as Democrats blocked the appointment but Sen. Williams recommended in March 1957 that Layton be appointed to a U.S. District Court seat. A month later President Eisenhower made the nomination.

In his first three years on the District Court bench, Layton spent much of his time handling the Delaware school desegregation case. In April 1958, he okayed much of a State Board of Education plan to desegregate schools one grade at a time over a 12-year period. Citing the dangers of "emotional strain" and "tensions," Layton declared that "any thought of a total and immediate integration of the Delaware school system is out of the question."

A year later, when it became apparent that the largely voluntary plan wasn't having much impact, Layton told the state board "to get down to the serious business of integration." The regulations in that voluntary plan made transfers inconvenient and difficult to blacks--so much so that only 25 blacks outside Wilmington had sought transfers for the 1959-60 school year.

In 1960, the U.S. Third Circuit Court of Appeals overturned the gradual plan Layton had okayed. That led to Wright's 1961 order of immediate desegregation.

Layton, one former court clerk said, has the reputation of being conservative, but the clerk noted this description comes not so much from his opinions as from his personal attitudes, which are very reserved and place a high priority on personal privacy. He is more of a patrician than Wright, his Georgetown schoolmate, the clerk said, perhaps because the judge "feels he has a family tradition to carry on."

In criminal cases, Layton is known as a tough judge. In 1972, he criticized a "rash of suits" filed by Delaware prisoners without the aid of attorneys as "frivolous" and "wholly without substance."

In civil cases, however, Layton has a tendency to be more flexible, and sometimes is willing to "make new law" with his rulings, one former clerk said.

Layton's courtroom manner is sometimes gruff, leading to the impression that he is, as one attorney said, "a grouch." But, one attorney added, being hard of hearing helps account for Layton's manner. "You'll have to speak up, please," he often reminds attorneys and witnesses.

Leaning back in his courtroom chair, with the U.S. flag just behind him, Layton appears every bit the aristocratic, no-nonsense jurist. And, most of all, he's a Delawarean -- "more of a Delawarean than anyone I've met," one clerk said.

The Trial. The Evans trial began on December 12, 1973 and ran for sixteen days, plus the closing arguments in March. Witnesses for the state included the assistant superintendent of the Delaware Department of Public Instruction, who drafted the EAA, and an attorney who worked on the bill. Both (together with plaintiffs' witness, the chief legislative sponsor of the EAA) testified that there was no intent to "ghettoize" or lock in Wilmington, nor any thought that the EAA might violate the Fourteenth Amendment.[47]

Superintendents of the Newark and Mt. Pleasant districts also testified. Lucas questioned them about the state's role in funding new school construction (60 percent) and pupil transportation costs (100 percent), in an effort to show overriding state control of education in Delaware.[48] (The judges ruled that other suburban superintendents need not be called as witnesses.)[49] Karl E. Taeuber,[50] a University of Wisconsin sociologist, and demographer William Lamson[51] testified for the plaintiffs concerning housing segregation, population patterns, and school boundary changes in New Castle County. Gordon Foster, education professor at the University of Miami (Florida), presented a "clustering" plan for desegregation.[52]

In the course of the state's defense presentation, it came out that the Department of Public Instruction had in 1972 prepared two reports on desegregation plans, a revelation which plaintiffs claimed contradicted the department's denial that it had desegregation on its mind at that time. Despite state claims that the recency of the reports (a year after the suit was reopened) made them irrelevant to the plaintiff's case, the press labeled them a "legal bombshell" and dubbed that the "climax" of the trial.[53]

Evans I

The three-judge panel issued its ruling on July 12, exactly seven months after the trial had begun.[53a] (Some observors felt the judges had delayed their ruling in hopes the Supreme Court would issue its decision in Milliken first.) Layton and Wright held that a dual system still existed in Wilmington, but didn't reach the question of whether the EAA was unconstitutional. They also postponed the question of whether the remedy would be confined to the city or would include suburban districts as well. Gibbons, in a separate opinion, took an even stronger position in support of the plaintiffs.

The majority opinion, authored by Layton, first considered whether the state board was the proper party defendant, a question which it said the board had raised unsuccessfully at "virtually every stage of the desegregation process." [54]

> In [an earlier case], the Delaware Supreme Court noted that desegregation began in the Wilmington School District only after the "necessary permission" was granted by a resolution of the State Board. Since that time, this Court and the Court of Appeals have repeatedly held that the duty to desegregate Delaware schools rests primarily with the Board. Recently, the Legislature reaffirmed this broad authority of the State Board in the Educational Advancement Act. . . .[55]

Judge Gibbons further explained the rationale for this by noting that "[r]esponsibility at the state level for public education has been assumed in Delaware to an extent far greater than in any other state to which we have been referred. We are dealing, it must be remembered, with a small geographic area and a small population."[56]

The majority also made clear that the state board remained the appropriate defendant even though a district school board had intervened as a plaintiff.

> The fact that the Wilmington Board of Education is an intervening plaintiff and alleges discrimination which it, as well as the State Board, was empowered to alleviate does not diminish the constitutional obligation of the defendants to provide a nondiscriminatory system of education for the children of this state.[57]

(Beyond this mention of the Wilmington board, and references to the fact that the Wilmington board was forbidden to desegregate without permission of the state board, the court shed no light on its decision to permit the Wilmington board to intervene.)

Second, the court addressed the "Defendants' Duty"--in effect, the judicial standard against which it would measure the board's action.

> [The Board had] the affirmative duty to eliminate from the public schools "all vestiges of state-imposed segregation." Swann. . . . When this Court [in 1961] accepted with certain modifications the proposed plan presented by the State Board, it made clear an additional requirement--that the plan would carry out the Board's constitutional duty only to the extent that it was effective.[58]

By invoking the Brown/Swann standard, rather than the Keyes requirement of proof of intent to discriminate, the majority implied that it was treating Wilmington as a "southern" district, not as a district that was, as federal officials had indicated in another context, desegregated as of 1967. This was made more explicit in the heart of the opinion, where the majority found that despite the post-Brown adoption of "facially neutral geographic attendance zones," from 1956 to 1973, no formerly de jure black school had fewer than 91 percent black students.

> This Court can only conclude that the presence of these schools is a clear indication that segregated schooling in Wilmington has never been eliminated and that there still exists a dual school system.[59]

Having found a violation of the plaintiffs' rights, the majority said it need not go on to consider whether the EAA was unconstitutional, or whether state action had perpetuated public and private discrimination.

Layton and Wright also declined to decide whether a remedy confined to the Wilmington School District alone would be constitutionally sufficient. The court thus ordered defendants (and invited plaintiffs) to submit alternate desegregation plans (a) confined to the existing boundaries of the Wilmington School District, and (b) incorporating other areas of New Castle County.

In a lengthy opinion concurring and dissenting in part, Judge Gibbons disagreed with the majority of the court on two issues.[60] First, he argued that the record before the court was sufficient to establish the unconstitutionality of the EAA. Gibbons prefaced this with a lengthy discussion of the "governing legal standard" in cases where de jure school systems operated at the time of Brown. He concluded that the appropriate standard looked to the effectiveness of a desegregation effort, not the presence or absence of benign (or discriminatory) motive. Thus, while admitting the difficulty of determining the legislative motivation behind the EAA, Gibbons said such a determination would not be relevant.

> . . . [I]f the effect of the provisions [in the EAA] fixing the boundaries of Wilmington is to prevent desegregation of white schools outside the city and black schools within, we need look no further.[61]

Gibbons also objected to postponing the question of what kind of remedy--Wilmington-only or metropolitan--would be sufficient.

> The State Board should be ordered to submit a plan for [metropolitan desegregation]. The majority's result, which proposes to consider a plan for sprinkling Wilmington's few remaining white students among its overwhelmingly black schools will not achieve desegregation of the essentially unitary Delaware statewide system of public education so long as most schools in surrounding districts remain identifiably white.[62]

And Then Came Milliken. Ironically, only days after Evans was decided, the Supreme Court ruled in Milliken, overturning the district court's metropolitan remedy order because there had been no showing of inter-district segregative effects.[63] (The high court had been called into special session on the Nixon tapes issue, and unexpectedly ruled on Milliken at the same time.)

The three-judge Wilmington court postponed submission of plans, and invited the suburban districts to intervene as defendants. They agreed, but declined the opportunity to reopen the record. Believing that Evans was indistinguishable from Milliken, the suburban districts felt the record was adequate to win, and so agreed to adopt the state board's pleadings and to stand on the existing evidence.[64] Accordingly, the judges conducted brief proceedings only on the impact of Milliken on the court's remedial authority.

Evans II

To the suburban defendants' great surprise, the Evans court succeeded in distinguishing Milliken. In an opinion issued March 27, 1975,[64 a-e] a Gibbons and Wright majority found that segregation in New Castle County was "a cooperative venture involving both city and suburbs."[65] That "venture" included:

> (a) a historic arrangement for inter-district segregation within New Castle County, (b) significant governmental involvement in inter-district discrimination, and (c) unconstitutional exclusion of Wilmington from consideration for consolidation by the State Board of Education. . . .[66]

(a) First, the majority found that prior to Brown, Wilmington and suburban school systems were significantly interdependent:

> Many black students traveled across district lines to attend [Wilmington's "colored" schools] . . . . At the same time. . . suburban white children crossed district lines to attend "white" schools in Wilmington, either because their home districts lacked a full twelve-grade program or because Wilmington schools were considered educationally superior.[67]

(b) The opinion, written by Judge Wright, next identified several ways in which federal, state and local government authorities "elected to place their 'power, property, and prestige' behind the white exodus from Wilmington and the widespread housing discrimination patterns" in the county.[68] These included (1) the 1936 F.H.A. underwriting manual which advocated racially homogeneous neighborhoods, (2) state sanctioning prior to 1973 of restrictive covenants, (3) public housing policies which resulted in all but 40 of 2,000 units being concentrated in Wilmington, (4) an optional attendance policy by the Wilmington board which allowed (white) students to attend city schools outside of their own geographic attendance zone, and (5) ongoing state subsidies for inter-district transportation of students to private and parochial schools.

(c) Most important, Gibbons and Wright ruled that the EAA, by precluding the state board from considering the "integrative opportunities" of redistricting Wilmington, violated the Equal Protection Clause and constituted an inter-district violation under Milliken.[69] The majority found no persuasive evidence that a "significant purpose of the [EAA] was to foster or to perpetuate discrimination through school reorganization."

> [T]he focus of the legislature's concern in developing the consolidation provisions of the Educational Advancement Act was on small, weak, ineffective school districts, and while the effectiveness of schooling in Wilmington at this time has been disputed, it is clear that Wilmington had larger staffs and better programs than many Delaware school districts. Moreover, Wilmington had historically been treated distinctively in Delaware education. . . . Finally, all Wilmington legislators, black and white, voted for the Educational Advancement Act.[70]

But the court had its eye not on intent but on the EAA's effect.

> [W]here a statute, either explicitly or effectively, makes the goals of a racial minority more difficult to achieve. . . the statute . . . requires a particularly strong justification.[71]

The state offered three justifications for the exclusion of Wilmington from school district reorganization. The court rejected them in turn.

(1) State: Altering the boundaries of the Wilmington School District would have required two-thirds approval of each house of the General Assembly.
Court: The "Delaware Constitution did not require a two-thirds majority for passage of such legislation, and an erroneous belief to the contrary" is no excuse.[72]

(2) State: Wilmington city and school district boundaries have historically been coterminous.
Court: The Wilmington School District boundaries "have frequently been disregarded in the name of educational interests thought to be overriding."[73]

(3) State: The 12,000-pupil limitation represented a legislative judgment that larger districts would be administratively unmanageable and would prohibit community involvement.
Court: "[T]here is substantial disagreement among professional educators as to the desirable maximum size for school districts," with estimates ranging from 8,000 to 125,000.[74]

Having determined that the court could legitimately consider both city-only and city-suburban remedies--which the parties were then directed to submit--Wright found it "appropriate to note certain differences" between New Castle County and Detroit, pertinent to the Milliken language stressing the mechanical infeasibility of metropolitan desegregation.[75]

> The New Castle County population is less than one-tenth that of the Detroit metropolitan area; Wilmington's is one-tenth that of Detroit. The proposed Milliken remedy would have involved three counties and fifty-four school districts; any remedy here would be confined to New Castle County and, at most, twelve school districts. There were 779,000 students in the Detroit "desegregation area", but there are only 87,696 in all of New Castle County. . . . Because of Delaware's history and demography, inter-district arrangements short of consolidation have been essential to education, and they continue today. . . . [In sum] the mechanics of an inter-district remedy here would pose few administrative problems of first impression.[76]

Judge Layton, dissenting, said he found no basis for considering an inter-district remedy. He maintained that one could not legitimately infer that present black population patterns resulted from the factors identified by the majority in (a) and (b) above.

> In my view, the majority's findings, so sweeping in effect, so heavy with inferences but so lacking in concrete, relevant substance, have fallen far short of fixing the responsibility for interdistrict racial discrimination upon Defendants' shoulders. What the majority does not face up to is that there seems to be no definitive explanation for the huge tide of black immigration into the nation's cities, and the white flight therefrom, in the past two decades.[77]

As for the EAA, Layton concluded that it was not unconstitutional, but that even if it were, there was no interdistrict effect, since the EAA merely preserved long-standing district lines. Layton also scoffed at the majority's comparison of Wilmington and Detroit, saying that "_Milliken_ is not a rule of size; it is a rule of law."[78]

The Plans Take Shape. Soon after _Evans II_, the state board came out with its favored plan -- a consolidation design that would merge the suburban school districts into six systems, with Wilmington split like a pie among five of them (all but Newark-Appoquinimink). This plan was basically the same as one first drafted in 1972 by the state Department of Public Instruction.[79]

Suburban school officials, themselves unable to agree on any particular plan, were less than enthusiastic about the state board's consolidation proposal. Many felt it was the most "complete solution short of a countywide school system," and far more excessive than the court would require.[80] Others felt the state's plan would not be palatable to Wilmington-- who did after all "win" the suit -- and proposed changing it to conform with the plan being prepared by the city.[81] John P. Sinclair, attorney for the suburban boards, announced that his clients, who had previously agreed with the state defendants at every turn, would likely take a more active role in the case subsequently. Sinclair said he "ha[d] reason to believe" the state was not firmly committed to any particular type of desegragation plan, in which case a variety of plans would be submitted to the court.[82]

Wilmington was actually preparing not one plan but four -- all variations on the theme of "clustering" -- the major difference being the number of suburban schools, and hence pupils, to be involved. Wilmington's plans called for retaining existing school districts and their governing structures, and exchanging students within a "cluster" composed of one Wilmington school and several predominantly white suburban schools. Central to this plan was retention of the Wilmington board; city school officials said that was crucial because of the board's experience in urban education and to look out for the interests of black students, who might have problems in schools dominated by suburban whites.[83]

Three of the four proposals called for moving more Wilmington students to the suburbs than suburban students into city schools. All of the clustering proposals omitted the three most distant suburban districts -- Newark, Stanton and Appoquinimink -- so as to minimize cost and transportation and prevent dispersion of black students throughout the entire county. Not surprisingly, Wilmington's plan was preferred over the state's consolidation plan by a number of suburban districts, particularly those omittted from the clustering plan altogether.[84]

Following a series of public meetings on the clustering plans, the Wilmington board voted 5 to 2 to adopt one involving seven of the eleven suburban districts. Two of the four black board members opposed it, and a third voted for it only after passage was assured. Wendell Howell, one of those casting a "no" vote, sharply criticized the plan for "mixing bodies" rather than improving education, and promised to submit his own plan to the state board.[85]

As the date for submitting plans to the court approached, the state board came under increasing pressure from suburban school officials, politicians and several citizens groups to offer the court a limited desegregation plan. The board had previously rejected such plans, on the advice of its attorneys who said the court would not accept them and might instead be forced to write its own plan. But the board's critics argued that the judges, not the attorneys, should decide whether or not a plan would be acceptable and a General Assembly committee agreed to draw up a resolution requiring the state to submit a voluntary plan to the court.[86]

In response to this pressure, the board readied a plan calling for students to select, on a voluntary basis, the school they would like to attend within designated regions -- "transfer zones" -- that would include both city and suburban schools. Existing school districts would be required to set up special magnet programs, funded by a property tax surcharge, to lure students of the underrepresented race. The voluntary "zone transfer" plan quickly became the second choice of most suburban districts, next to a Wilmington-only remedy.[87]

Nineteen Plans. On October 20, 1975, the Evans court convened to consider some nineteen plans submitted to it. The hearings began with an audience of 60 and so many attorneys that some had to take notes from the jury box. The state board's attorney, William Prickett, declared the voluntary zone transfer plan to be the board's favorite, and sharply criticized the board's earlier, mandatory consolidation plan.[88]

The first week of hearings -- devoted entirely to the zone transfer plan -- saw the state board put continually on the defensive. School officials from Tulsa and Houston -- where voluntary desegregation techniques had been used -- conceded that there was no guarantee of success.[89] Albert H. Jones, state board president, drew sharp questioning from Judge Gibbons and Wilmington attorney Louis Lucas; after repeatedly being asked what would happen if the innovative programs didn't lure enough volunteers, Jones responded, "It's a question of hope, I guess."[90] Following unproductive questioning of a Department of Public Instruction witness who helped develop cost data on the plan, Judge Gibbons told Lucas that the witness "has given us all he can about the cost of the zone-transfer plan and it isn't very much."[91] Lucas and another attorney called on the judges to stop considering the plan, which they said contained "nothing even remotely resembling" an adequate desegregation proposal.[92] However, Gibbons rejected their plea as premature.[93]

After the first week's disaster, the defense took steps to salvage its volutary plan. To put flesh on the plan, state and suburban officials outlined special "magnet school" programs that would be offered. The state board also added several mandatory aspects to the plan: transfers were limited to "majority to minority" cases; Wilmington officials were given equal representation with suburban officials on curriculum councils; and the phrase "freedom of choice" was replaced by "racial goals."[94]

Suburban Districts Skirmish. The hearings on the zone transfer plan took an important detour the second week as attorneys for the Mt. Pleasant and Newark school districts skirmished over the inclusion of Newark in the desegration area. Mt. Pleasant brought in expert witnesses to testify that the state's plan, by excluding Newark, would provide a haven for "white flight." Moreover, Newark's inclusion would reduce the percentage of blacks in the desegregation area from 24.2 to 19.9, which Mt. Pleasant argued would reduce potential problems.[95] (Including Newark would also spread the tax burden associated with desegregation.) By arguing that Newark's inclusion was entirely feasible -- in terms of transportation distance, administration, etc. -- Mt. Pleasant made a convincing case for the practicality of a countywide desegregation remedy.[96] Many of the parties to the defense anticipated the effect Mt. Pleasant's strategy would have, and bitterly opposed it -- even some districts that Mt. Pleasant felt should have been supportive -- namely, suburban districts contiguous to Wilmington, which would be included in a desegregation plan no matter what. Some of those districts did eventually back Mt. Pleasant, but the incident left many hard feelings.[97]

Hearings Go Into Overtime. The final week of remedy hearings began in mid-December, exactly two years and two days after the original trial had opened.[98] The three judges set special Saturday and evening sessions so as to be able to consider all of the remaining plans before New Year's Day.[99] However, most of the attention focused on three of those plans -- the state board's early-favored consolidation plan; a "super district" plan proposed by De La Warr, the predominantly black suburban district; and the Wilminton Board's Metro (cluster) Plan.

De La Warr's plan called for a single, countywide district and a uniform county tax rate -- a remedy which would greatly advantage De La Warr, the poorest of all the districts. State Superintendent Kenneth C. Madden testified that such a plan would undo Delaware's long tradition of small school districts closely controlled by area residents. The Department of Public Instruction also opposed the plan, secretly fearing that a countywide district upstate would lead to others downstate, and eliminate the need for the department.[100] The De La Warr plan received an indirect endorsement from Dr. Gordon Foster, in the course of his testimony for the Wilmington Board's cluster plan. Lucas also told a reporter that the Wilmington Board was "amenable" to having a countywide desegregation plan, but that the cluster plan should be followed in the interim so that by retaining existing boards, students' interests would be protected.[101]

The cluster plan met with opposition from suburban officials, who testified that it would be an "administrative nightmare" to serve students who live in one district and attend school in another.[102] Mary DiVirgilio, vice president of a suburban school board, told the judges, "If you give us a hill, we'll make it. If you give us a mountain, I'm not so sure." She explained that a "mountain" was a plan involving busing across district lines.[103] The state also brought in an expert witness from the University of Pennsylvania who testified convincingly about the prohibitive problems of pairing schools across district lines. (When queried about the court's preoccupation with administrative feasibility in its subsequent remedy decision, attorneys in the case consistently pointed to the persuasiveness of this witness.)

Evans on Appeal. Judicial attention to the Evans suit was not limited to the U.S. District Courthouse. Following Evans II (which, among other things, enjoined the state board from relying on portions of the EAA found to be unconstitutional in preparing its interdistrict plans), the defendants appealed to the Supreme Court under a federal statute which gives the high court jurisdiction in cases where a district court of three judges has granted an injunction.[104] The appeal argued, basically, that despite similarities between the Wilmington and Detroit cases, the district court's conclusion in Evans was opposite that reached by the Supreme Court in Milliken. The appellants also asked the Supreme Court to consider whether the EAA was unconstitutional, given the absence of any finding of discriminatory intent.[105]

On November 17, 1975 (during a recess in the remedy hearings), the Supreme Court responded in four words: "The judgment is affirmed."[106] The 6 to 3 vote marked the first time the Court had approved the desegregation of an entire metropolitan area, with the likelihood of large-scale busing between city and suburbs. Rehnquist, joined by Burger and Powell, dissented, saying that the lower court acted incorrectly in granting an injunction, since the EAA was then no longer in effect, and that it was "extraordinarily slipshod judicial procedure" to decide the case without a hearing.[107] The state board immediately asked the high court to reconsider and clarify its ruling (this marked the first time Philip Kurland, the board's appellate counsel, had filed a rehearing petition with the Supreme Court) but the request was denied in January.[108]

Evans III

In its remedy opinion, issued May 19, 1976, 22 years to the week after Brown, the court rejected all nineteen plans before it and opted for a single district covering most of northern New Castle County.[108a] Judge Layton dissented from the majority's plan, but concurred in the requirement of an inter-district remedy.

For purposes of discussion, the court categorized the nineteen plans as follows:

I. Wilmington-only Plan

II. Inter-District Plans

- A. Voluntary Plans (magnet schools, free transfer provisions)
- B. Mandatory Assignment Plans (clustering): district boundaries remain unchanged; students are transferred and transported among districts.
- C. Reorganization and Consolidation Plans: district boundaries are changed; new school boards assign students within the area.

The 87-page majority opinion, written by Judge Wright, set forth the court's standard of judgment in classic "legalist" language.

> Our duty is to order a remedy which will place the victims of the violation in substantially the position which they would have occupied had the violation not occurred. . . . In light of this standard, we must determine whether sufficiently remedial actual desegregation is possible under a plan which would be confined to the boundaries of the present Wilmington district; what level of desegregation will at a minimum establish that a dual system is no longer operating; how wide a geographical area must be included to accomplish properly that result; and by what method and with what safeguards this result can be accomplished.[109]

The court also rejected the argument posed by suburban districts --that since they did not individually commit constitutional violations, they should not be brought into the remedy:

> Such a defense is inadequate where, as here, the local boards are creatures of the state, and it was the State Legislature and the State Board of Education which acted in a fashion which is a substantial and proximate cause of the existing disparity in racial enrollments in the districts in Northern New Castle County.[110]

Wilmington-only Plan. Central here was the court's definition of the relevant community:

> If the community whose characteristics would be determinative of the weight to be given to the enrollment figures were seen as Wilmington alone, such a plan might afford the relief which the Constitution requires . . . [but] in these circumstances, it is apparent that the entire northern New Castle area must be treated as one community in terms of its population characteristics, because that is the way it was perceived and treated by the State and its citizenry.[111]

Given that the Wilmington School District was 85 percent black, and that the suburban schools were (except for De La Warr and Appoquinimink) over 90 percent white,[111a] the court concluded that a city-only plan could not possibly achieve the necessary racial balance.

Voluntary Plans. Similarly, the zone transfer and other voluntary plans, which relied on the magnet concept, offered little promise of significant desegregation.

> The magnet program is heavily dependent upon the unique drawing power of particular programs and faculty to attract and hold students. There is necessarily a limited market for special programs. Absent a showing that significant desegregation must occur in fact as part of the operation of magnet schools, the Court cannot accept t he plan. No such showing has been made.[112]

Mandatory Assignment (Cluster) Plans. The court's objection to these plans was not based on their inability to achieve racial balance:

> Where desegregation is to take place in one school district, the use of clusters and pairings, as well as other sorts of reassignment and transportation schemes offer the best guarantee that actual desegregation will take place.[113]

Rather, the court felt that an inter-district transportation plan, standing alone, would be prohibitively difficult to administer and "fraught with complex problems unsuited for judicial determination."[114]

> In Delaware local districts have had a long history of control over curriculum and text choice, as well as the common governmental functions of setting and levying taxes, and maintaining communication and accountability between administrators and parents. The transportations schemes would endanger all of these functions, or make their performance much more difficult.[115]

The court's discussion of the Wilmington School Board's cluster plan in particular bears quoting at length:

> The Wilmington Metro Plan . . . would place the Court in the ongoing position of general supervisor of education in New Castle County. In the event of disagreements over curriculum patterns or textbooks, the Court or a master would have to step in. Moreover, the relationship of parents to the school their child attends, and the interests which they take in the operation and policies of that school can be an important determinant of the success of the child in education. . . . The Wilmington Metro Plan would make it much

> more difficult for individual parents to require accountability from teachers and administrators who are employed by districts other than that of their voting residence.[116]

The court was quick to note that administrative complexity was not automatic grounds for rejection:

> The mere fact of extra administrative burden is not, of course, sufficient to make a plan so impractical or burdensome as to be beyond the equity power of the Court.[117]

But, where other, less problematic methods were available, the court said it was obliged to pursue those. More specifically, "such plans are better drawn where the greatest possible degree of control is in the hands of local leaders acting in accordance with constitutional limitations."[118] The court concluded that no cluster-type plan would satisfy "the test of administrative feasibility which is, in our view, an absolute prerequisite to the long-range success of any remedy."[119]

Reorganization Plans. The court was quick to note that its power to order a reorganization plan was not in doubt. Moreover, it considered such a remedy particularly appropriate here, given that one of the violations involved improper school district reorganization. Nevertheless, the state board's consolidation plan was rejected because it required judicial decisions for which there was "little guidance from state or federal constitutional guarantees:"[120]

> The State Board and suburban districuts would have us determine e.g., where present districts should be cut, and what weight should be given to equalizing tax

> assessments or populations . . . [T]he issues of transportation time and population levels of appropriately sized districts ought to be dealt with explicitly by State education officials.[121]

The court also dismissed De La Warr's proposed countywide district, because it would mean ordering "a major shift in Delaware school policy."[122]

The Court's Own Remedy. Having concluded that "[w]ithout reorganization of some kind, no plan will be . . . administratively feasible. . ."[123] the court offered its own plan — a single school district encompassing most of northern New Castle County. What distinguished the court's plan from De La Warr's (as well as from the 18 other plans) primarily was its "default" status: it would take effect only if the state failed to come up with its own acceptable reorganzation plan.

> The change wich we require *intra*, although initially setting up a large district, is not only subject to appropriate subdivision for local control over issues of policy in particular schools, or local initiative with regard to curriculum, etc., but is also subect to redivision into smaller governmental units by action of the State, so long as [it does not frustrate] the desegregation objective.[124]

The judges reiterated this at several points, for example in setting out the governance mechanism for the consolidated district:

> We repeat that the State Legislature and the State Board of Education may take such steps as are not violative of constitutional rights to change the pattern set here.[125]

Concern with State Law. The court emphasized that in determining a reorganization plan, it had tried to comply with state law wherever possible:

> It would seem clear that we are not bound by state law, for this is a matter of a federal remedy for a violation of federal rights. . . However, we read Milliken as requiring that the equity court. . . give proper deference to the traditions and acts of the states in setting up educational units.[126]

This posed a dilemma for the court, in that the State legislature's intent, as expressed in the EEA, was that reorganization be limited to (1) whole districts, and (2) districts with fewer than 12,000 students. To satisfy the 12,000-pupil provision would requre the court to split up the Wilmington School District, and would necessarily go against the legislature's intent in that regard. More important, were the court to divide up Wilmington, it would be assuming responsibilities better left to local decision makers.

> Local community control is, of course, an important feature of American education, and we are required to give deference to it unless circumstances dictate otherwise.[127]

More specifically,

> [t]he alternative [to consolidation] would be for the Court to attempt to redistribute the population and tax ratables of the area by drawing new district lines. . . Even if we were to assume, as the State Board evidently did, that Wilmington should be treated as the source of the "problem" and that no other district lines need be shifted, we would be required to determine

> which alternative presented by the parties was the "fairest" way to split that district. For the court to become involved in such a task in the first instance, would be to raise many of the problems which the Supreme Court in Milliken found to be unsuited for judicial determination.[128]

The court thus opted to ignore the 12,000-pupil limitation and consolidate multiple districts, though "subject to the power of the Legislature to redivide the areas in the future, using appropriate lines which are non-racial in their purpose and effect."[129]

Geographic Area. A less important remedy question was which areas to include in the consolidation. At issue were two outlying districts — Appoquinimink and Newark. The court chose to exclude the distant Appoquinimink, which already had a 30 percent minority enrollment. But Newark's inclusion was deemed feasible in terms of distance, and desirable in other respects — specifically, those demonstrated earlier by Mt. Pleasant attorneys.

> [U]ncontradicted testimony indicates that the stability of any desegregation plan is enhanced by the inclusion of larger geographical areas and higher white populations. The Court cannot ignore the fact brought so forcefully to its attention that desegregation is costly, in ways beyond dollars spent on additional equipment and training. The difficulties of declining tax bases, and the problem of preventing growth areas from maintaining the duality of schools in the Northern New Castle County area require the inclusion of Newark.[130]

Racial Ratios. Having "produced" a district with approximately 80,000 students, 79 percent of them white,[131] the court turned to the sensitive question of "numbers."

> Ordinarily, racial enrollments of each school would not be a question to be addressed initially by this Court. As the Supreme Court said in Swann, assignment of students is first and foremost a function to be performed by local officials in light of local conditions. We do not propose the imposition of definitive racial quotas for particular schools. What we set forth here is not a determination of a "quota." Rather, it is a statement of what will be considered a desegregated school upon any necessary review of actual assignments made by local officials.[132]

The judges rejected those numbers arrived at by taking the actual minority enrollment plus or minus 15 percent ("the usual figure").

> [T]hat figure [± 15 percent] would produce the substantial possibility of minority enrollments of under 10% in predominantly white schools. . . [S]uch a figure presents severe difficulties in the "identity" of minority youngsters, who would not see fellow minority students in positions of leadership in the school. Moreover, the 15% variation would allow enrollments in schools at the higher end of the range to approach 40% black enrollment, a figure which is said to produce a substantial likelihood of white flight.[133]

Instead, based on "all of the factors" in the case, the court determined that schools with a 10 to 35 percent black enrollment would be considered prima facie desegregated.[134]

Interim Board. In setting up a governance system for the consolidated district, the court again sought to comply with state law. The court called for an Interim Board which would be

> appointed in accordance with the system used in the reorganizations under the Educational Advancement Act. That is, the new board will consist of five members appointed by the State Board of Education from among the existing boards of the component districts.[135]

This directive would necessarily result in certain districts being unrepresented. However, the court stated that the alternative of devising its own method of selection or election seemed less desirable than following state law. Moreover, limiting the number of board members to five would allow them "to work closely together and to be called together quickly to deal with policy matters."[136] Making numerous references to "local control" over school operations, the court left responsibility to the board for pupil assignment, levying taxes, hiring faculty and setting curriculum.

Teachers. The court did not order an affirmative action plan for teachers because it lacked information in the record upon which to determine the scope of any alleged violation, and had no basis upon which to order such a plan. The other faculty-related issue concerned the "leveling-up" of salaries and benefits (all teachers are brought up to the level of the highest paid ones) as part of the reorganization— a policy recommended by teachers' and educational groups to ease labor strife, required by the EAA for consolidated districts, and estimated to cost $14 million annually for New Castle County.[137] The court declined to order leveling-up for three reasons: (1) it wanted to avoid freezing the reorganization plan in place; (2) it had no figures on salaries disparities; and (3) it felt that an issue which would affect "tax rates and day-to-day operations" was better left to local decision makers.[138] (Leveling-up, along with the 12,000-pupil limitation, represent the two points where the remedy ruling conflicted with state law.)

Other Remedy Issues. The court called for a two-year phase-in of the plan, beginning in Fall, 1977, for the upper grades and involving virtually all students by September, 1978.[139] (The Fall, 1977 starting date gave school officials an unexpected delay.) "Rising" seniors and kindergarten children were exempted from reassignment.[140]

The court welcomed attempts to desegregate voluntarily through magnet schools and other means. However, such attempts would in no way affect the state board's ultimate responsibility to desegregate:

> Thus, if the new board were to try magnet schools to desegregate the upper elementary grades during the first year of operation, the Court will follow the attempt with great interest. Regardless of the success of that endeavor, however, the Court will require the plan to achieve actual effective desegregation for all affected grades by the second year of operation. . .[141]

With regard to bilingual education, the Interim Board was instructed to insure that affected students would be placed in schools in sufficient numbers to allow such programs to continue.[142] The court did not treat other major curricular or administrative concerns (except for monitoring of the remedy, discussed below). Nor was the issue of taxation or fund expenditure addressed, beyond the discussion noted above on leveling-up.

The court declined to rule on three miscellaneous issues. Using a "good faith" rationale, it dismissed the Wilmington board's proposed moratorium on new construction in predominantly white areas:

> We must assume that local authorities charged with the implementation of the plan will do so in good faith, and will follow existing law with regard to the construction of new facilities.[143]

Although it had ruled in Evans II that state transportation subsidies to students attending private schools had contributed to segregation, the court refused to halt the practice.

> Any injunction against the continuation of the State's policy of providing this subsidy must await a showing of its effects under the operation of the remedial plan here ordered.[144]

By the same rationale, the court refused to appoint a monitoring commission.

> [W]e see no need for such a commission to be invested with power by the Court. The existing committees have

> derived their power from the concern of State or local officials and groups. To add the power of the Court to these groups would raise disturbing issues of how to support and supervise such an ad hoc "master."[145]

Quality of Education. Finally, the judges underscored their desire to leave educational decisions to educators. The comments bear quoting at length:

> The operation of public schools is traditionally a matter of local concern, and properly so. This Court has intervened only reluctantly in that process, and only for limited purposes. We were urged throughout the hearings in this case to be concerned with the "quality of education" offered by the area schools. That is much more properly the concern of local officials and the parents of children in the schools. Our duty here is not to impose quality education even if we could define that term, though we must be conscious that the implementation of the remedy does not defeat the ability of local agencies to fulfill their duty to offer it. We do not find in Brown a mandate for District Courts to concern themselves with how well the educative function is performed. . . There has been much discussion, and there undoubtedly will continue to be much writing upon the topic of whether black children learn better in desegregated classrooms. [But] our holding does not rest upon those considerations, not least because judges are unqualified and inexpert in answering such questions.[146]

The three-judge court then dissolved itself, retaining supervisory jurisdiction within the district court.

Layton's "But for" Dissent. Judge Layton concurred in that part of the opinion requiring interdistrict busing, since he agreed that the "Wilmington Only" plan as submitted fell short of meeting constitutional standards, but he objected to the majority's plan as overkill. He disputed the "stroke of a pen" abolishment of 11 school districts, the assumption that "'but for' the constitutional violation, Wilmington schools would still be 80% White and 20% Black," and the decision to bus unnecessarily large numbers of students.[147] In its place, Layton recommended achieving a 75-25 black-white ratio in Wilmington schools (what a "reasonable man" would consider to constitute desegregation) through the exhange of 2,000 Wilmington blacks with an equal number of suburban whites.[148]

The formal order to implement the May 19 ruling spelled out how the Interim School Board would be funded: through costs shared by districts on the basis of assessed valuation, with the state board paying the same amount paid by that district with the highest assessed valuation (Newark). The judges rejected a request to expand the board from five to eleven members. Gibbons said the court had been guided by the 1968 EAA, which required five-member interim boards following district consolidation, but he added that this did not preclude the General Assembly from expanding the new board.[149]

The court also rejected the Wilminton board's request that it be allowed to remain in existence after the appeals process was over so as to monitor the Interim Board. Gibbons said that if the board didn't conform to the court's order, "we'll hear about it."[150] He added that the new board had less leeway in drawing up the desegregation plan than some people believed: "The opinion sets forth the desegregation plan. The new board will only draw up a pupil assignment plan."

Response to Evans III. Within days, the state General Assembly approved a package of legislation prepared by its joint legislative desegregation committee. The package contained four bills which: 1) by constitutional amendment, gave the assembly the power, then held exclusively by the state Board, to change school district boundaries; 2) liberalized the existing law on voluntary student transfers so as to permit such transfers among all eleven districts and with the permission of only the receiving school; 3) expanded the Interim Board from five to thirteen members (two each from Wilmington and Newark, and one from each of the smaller districts); 4) extended the life of the joint desegregation committee for another year.[152]

The legislation was generally consistent with action being taken by the state board to implement the court order. In particular, the constitutional amendment was in line with a resolution adopted by the state board which "vigorously oppos(ed)" a single school district for the merged area and directed the Interim Board to develop a multi-district plan as one of its first tasks.[153] However, State School Superintendent Madden objected to the bill expanding the new board, stating that he and many other educators felt a smaller panel made it "easier to get agreement and to get things accomplished."[154] Wendell Howell, president of the Wilmington Board, had also opposed the bill because it diminished the 20 percent representation granted Wilmington (and Newark) by the court.[155]

The New Board. Thirteen interim board members, nominated by local school boards, were officially confirmed by the state board on July 6.[156] The News-Journal described them as a "typical cross-section of New Castle County."[157]

* average age: 45

* three blacks; ten whites.

* six employed by chemical companies; three housewives; two civil-servants; one self-employed.

* average years of experience on school boards: 8.5.

(See Appendix for full list of members.)

The major issue facing the new board was whether to subdivide the area merged by the court. Nine of the eleven merged districts, as well as the state board, favored a multi-district plan. State Superintendent Madden was perhaps the staunchest proponent: "I will fight with every strength in me to oppose the tendency to move to centralization in the name of economy, efficiency or the like. I think it (a countywide plan) is foreign to Delaware's system of operation."[158]

The strongest advocate of a countywide plan remained De La Warr Superintendent Laurence Hopp. However, Hopp's reasoning was often discounted by others because De La Warr stood to benefit the most from an equalized county tax rate. Lula Cooper, the single black member of the state board, was the only other public figure to question the multi-district plan. (A second member of the state board voted against directing the Interim Board to develop a multi-district plan, but only so as not to foreclose the new board's options.)[159]

Goals by the Pound. By early fall, an interim board task force (one of 16) was immersed in studying how to reorganize the county to desegregate. Guding the study was the new board's overall plan -- a four pound tome outlining 16 goals, 100 objectives, and 700 "key events."[160] With respect to reorganization, equalizing per-pupil spending among districts was a priority second only to meeting the court-mandated racial ratios. Third in importance was maintaining existing district boundaries as closely as possible.[161]

Three reorganization plans emerged as strong candidates for reorganization: a unitary plan -- similar to the court's single-district remedy, but with regional superintendents added; a multi-district plan -- Wilmington divided like a pie among five or six newly-formed suburban districts; and an intermediate plan -- leaving the eleven districts intact and establishing an intermediate board to assign pupils across district lines.[162]

While the intermediate plan had serious drawbacks in the new board's eyes -- primarily, that children would be attending school in districts where their parents had no direct control -- there were major offsetting benefits. The plan minimized the need to level-up teachers' salaries, preserved all existing administrative jobs (a Superintendents Council exercised strong control over interim board decisions), and was easily reversible in the event of a favorable appeal. Moreover, the plan offered the best chance of approval by a state legislature unwilling to take any positive steps toward reorganization.[162a]

Supreme Court Dismisses Evans Again. The prospect of an appellate court overturning the three-judge remedy grew dim in the closing months of 1976. In September, the state again filed a "jurisdictional statement" with the Supreme Court, this time supporting its motion to appeal directly the district court remedy order. State board attorneys argued that the three-judge panel had exceeded its authority in ordering an interdistrict remedy and establishing racial ratios, and requested the high court to clarify its post-Milliken position on metropolitan remedies: "Even a reversal of this court's decision (in the Detroit case) is to be preferred to the uncertainty that now reigns, an uncertainty that spawns social conflict."[163]

The state grew more optimistic that the Supreme Court would take the case in October, when the U.S. Department of Justice filed a brief arguing that the district court ruling went too far in requiring the creation of a single consolidated school district and in setting racial attendance ratios for each school. The brief was a mixed blessing however, since it went on to argue that the district court's findings would require "a significant interdistict remedy."[164] The Justice Department also maintained that the Supreme Court should not have jurisdiction over the case at this time -- rather the Third Circuit should hear the appeal -- because the three-judge panel should have dissolved itself after the liability phase of the case, leaving the remedy phase to a single judge.[165]

All of the suburban school districts but De La Warr filed briefs with the Supreme Court as well. Four of the districts not adjoining Wilmington argued that they had special reasons for being left out. Others raised questions about the absence of findings of discriminatory intent and the limits of the court's power.[166]

But to the frustration of the appellants, many of whom were convinced they could win if only the Supreme Court would agree to hear the case, the appeals were dismissed on November 29 for "want of jurisdiction."[167] The high court did not explain its action, but a subsequent appeals court opinion speculated that it was for the reason the Justice Department had argued: there was no need for a three-judge court to determine the remedy.[168] Following this setback, the state appealed to the Third Circuit to overturn the desegregation order, and prepared for many more months of waiting.

A week after refusing to hear Evans, the Supreme Court remanded the Austin, Texas school desegregation case for revision in light of the Washington v. Davis holding on discriminatory intent. State board attorneys immediately asked the district court to delay planning and implementation of desegregation pending the outcome of its appeal.[169] Interim Board president Gilbert Scarborough openly criticized the state's timing, saying the new board's efforts should not be halted until a desegregation plan was completed.[170] In response to the state's request, U.S. District Court Judge Murray M. Schwartz set a hearing for the following Monday.

Enter Judge Schwartz. When Judge Caleb Wright relinquished the school desegregation case in 1976, after having been involved in it since 1958, it was especially — well, fitting — that Murray M. Schwartz, should take over. A Pennsylvania native, Schwartz had originally come to Delaware in 1956 to serve as the first law clerk to the recently-appointed Wright. The two men developed a strong affection and respect for one another during that year. Then, in 1973, it was the vacancy created by Wright's retirement to senior status that Schwartz was appointed to fill.

According to Chief Judge James L. Latchum, who oversees the weekly meetings where district court cases are allocated, when Wright relinquished the Evans case, Schwartz was the only judge available to handle it.[171] But most lawyers in the case were surprised, expecting Wright himself to keep the case after the three-judge panel disbanded.

The following is taken verbatim from a profile on Schwartz published in the Sunday News Journal, Nov. 20, 1977:

> Finding out about Schwartz's life off the bench is not an easy task. A very private man, he has steadfastly refused to grant personal interviews. What has been learned about him for this profile has been uncovered through public records and talks with his associates, almost all of whom asked not to be identified.
>
> Although Schwartz is a low-key person, his friends report that he is warm and open with people he knows well. His former law clerks describe the atmosphere in his chambers as informal, and say he is easy-going, accessible and has a good sense of humor.
>
> Some hint of the private Schwartz comes across in the courtroom, where he will frequently smile over an amusing point or laugh out loud if someone cracks a joke.

On the bench, Schwartz is an imposing figure. However, people who have only seen him in his judicial robes often comment on his size when they see him elsewhere since Schwartz is 5 feet 4 inches tall.

Born in Ephrata, Pa., in the heart of Pennsylvania Dutch Country, Schwartz was remembered as a top pupil from his youngest days.

"He was an excellent student," recalls A. Frank Naddeo, editor of the Ephrata Review, for which Schwartz covered high school sports.

A frustrated athlete, Schwartz managed his high school football, basketball and baseball teams. Today he is a sailing enthusiast and drives an orange and black Porsche with verve.

Schwartz's father had a men's clothing store in Ephrata, where Schwartz worked part-time as a student. After graduating from high school, he went to the Wharton business school division of the University of Pennsylvania where he received his undergraduate degree in 1952. He attended the university's law school, where professors still speak of him as an excellent scholar.

Schwartz came to Delaware in 1956 and started as a clerk for Wright, now a senior district judge.

In 1959 he was appointed a deputy attorney general. He also maintained a law practice with Murdoch, Longobardi, Schwartz and Walsh. Joseph J. Longobardi, now a Superior Court Judge, and Schwartz both quit the attorney general's office in 1961, saying that the office was desperately understaffed.

Eight years later, Schwartz was named a bankruptcy referee, a part-time job. During his tenure he presided over the Lammot du Pont Copeland Jr. bankruptcy proceedings, the largest personal bankruptcy ever until then.

Later, Schwartz also took an active part in the Family Court, where he helped revamp that judicial system. At that time, lawyers hoped Schwartz might consider a judgeship on Family Court because of his thorough and diligent work on the project.

Since coming to Delaware, Schwartz has maintained his reputation as a highly capable lawyer. When Sen. William V. Roth Jr., R-Delaware, set up a search committee in 1974 to help him nominate a federal judge, Schwartz's name came up.

"Schwartz was considered a capable guy who did his homework," said another, and "we were looking (to nominate) either an Italian or a Jew," he added. "But I never could understand why Schwartz got the appointment -- he's too apolitical."

Schwartz also has a reputation as a conservative. This will surprise those who think of him as a liberal on the bench. "I think it's more the cases he's gotten than his philosophy," said one associate.

"It's very fortunate he has children involved (in desegregation)," says a friend. "He knows how parents feel and has a sympathetic attitude."

Schwartz, who lives at 170 Brecks Lane, Henry Clay, in The Alexis du Pont School District, has three daughters, Stacia, 16, Susan, 11; and Merle, 9. According to friends he is very close to his children.

Schwartz' Other Rulings. Even before he had gotten an opportunity to anger Delaware residents with his decisions on school desegregation, Schwartz issued two rulings--one on homosexual rights, the other on prison overcrowding--destined to make hardhats everywhere curse the courts. When Richard Aumiller was dismissed from the University of Delaware faculty for alleged advocacy of homosexuality, Schwartz chastized the university and its president.[172] He also ordered that Aumiller be given $12,454 in back wages and $15,000 in compensatory and punitive damages.[173] Even more controversial was Schwartz' ruling on prison conditions,[174] summarized in the following article from the Feb. 17, 1977 Wilmington News-Journal:

> Describing the Delaware Correctional Center as "a powder keg capable of explosion at any time," U.S. District Judge Murray M. Schwartz yesterday ordered prison officials to reduce the maximum inmate population in two stages to 475 by July 1.
>
> The population of the prison north of Smyrna was 680 yesterday. In December, the population was around 760 in the facility designed for a maximum capacity of 531.
>
> In an 88-page opinion, the most in-depth critique ever written of the six-year-old $13 million prison, Schwartz noted the many weaknesses of a facility once touted as a model prison for the nation.
>
> He touched on rampant homosexual attacks, thievery among prisoners, low staff morale, widespread idleness, poor health facilities and inmate disturbances that "could easily become a major riot." At one point, he called the prison "a ticking time bomb."
>
> Schwartz admitted he went further afield than required and offered "viable options available to the State of Delaware to protect its citizenry" by keeping the prison population down to a workable level.
>
> The judge's opinion was the result of a suit brought against Department of Correction officials by a group of prisoners through the Community Legal Aid Society.

After the December trial, Schwartz ordered the population of the prison reduced to 700, and officials released certain prisoners guilty of non-violent crimes on furloughs, work release, and lower bail.

In his final-opinion yesterday, Schwartz said:

- -- Until March 15, the maximum prison population shall be 700.
- -- Between March 15 and June 30, the maximum inmate population shall be 600.
- -- After July 1, the maximum population shall be 475.
- -- All cells used as permanent living quarters shall be single cells containing a minimum of 60 square feet of floor space, except the four receiving cells known as "the bull pen."
- -- All dormitories shall have flush toilets or urinals and lavatories, in the ratio of one to eight inmates.
- -- After July 1, this year, there shall be no double cells, and any area not designed or converted for permanent residence use will not be used to house inmates on a permanent or temporary basis.
- -- Hallways in the pre-trial section of the prison, television rooms, libraries, staff dining rooms, and certain sections of the prison hospital "not designed or converted for permanent housing of inmates" must not be used for housing of prisoners.
- -- After July 1, the prison hospital shall be used only for those who are physically ill "and for an aggregate of no more than 10 inmates segregated for their own protection or who are emotionally disturbed."

Trial testimony revealed that the prison hospital, designed for a capacity of 26, was used to house healthy inmates in addition to sick men and that the hospital usually had an average of 50 inmates, only nine considered physically ill or exhibiting "bizarre behavior."

The judge took emergencies into consideration, ruling that on and after March 15, the total emergency population shall not exceed 600.

Schwartz also ordered, "In the event of new construction the maximum inmate population shall be increased to 92 per cent of the number of inmates capable of being housed in the new buildings."

The federal judge said he did not want to intrude into state affairs, but "relief has been ordered in this case because the State of Delaware has failed to adhere to its own statutes and regulations."

The state must decide "whether to embark upon an expensive program of building and staffing more prisons like the Delaware Correctional Center or to pursue vigorously the development of less costly alternatives to prison."

Schwartz' opinion and subsequent order contain a detailed formula for prison officials to comply with the capacity rules.

Schwartz also expressed doubt that any new housing for prisoners can be constructed in the near future.

He suggested diversion of non-serious offenders from prison through bail reform and placement of a deputy attorney general in the magistrates courts to avoid unnecessary imprisonment.

"Can the state of Delaware afford the financial and social costs of incarcerating individuals who do not require incarceration and incarcerating others longer than is necessary to protect society?" he asked.

"What would be the result if selected prisoners were put out on the street under close supervision? Even an unprecedented ratio of one supervisor for 15 inmates would still be five times less expensive than the current prison staff to inmate ratio," Schwartz said.

The program of work services, where inmates are assigned to community projects should be further

> examined for expansion to more than New Castle County, he said.
>
> The restoration of the half way house in the open community, now discontinued, might be reconsidered, he said.
>
> Expansion of the work-release center might be considered as an alternative to constructing new prison facilities, he said.
>
> Schwartz said if his alternatives were implemented, about 235 prison beds would not be necessary and about 11.5 million would be saved.

Evans Continues Under Schwartz. In their first hearing before Schwartz, state board attorneys argued that, in the absence of a court-ordered delay, the board would be forced to take "costly and irreversible" steps before the appeal was decided--specifically, making contractual agreements with teachers, administrators and bus companies that would be binding for a year.[175] However, Schwartz found the request "premature," since the state had the power (as provided for in the remedy order) to modify the court's desegregation plan.

> The State Board's argument assumes that the legislature will not act and that the plan outlined in . . . [Evans III] will take effect on July 1, 1977. Only if the General Assembly fails to step in with alternative arrangements for desegregation, however, will the local and State boards be required to take the steps outlined by defendant in its motion.[176]

Moreover, the judge noted that the appeal might well be decided before the deadline for signing contracts.

The Intermediate Plan. Once Schwartz denied the delay, the interim board members rolled up their sleeves and began debating the various desegregation plans. It took little over a week for them to choose the eleven-district intermediate plan--in effect, a decision to delay reorganization for a year or more.[177] Ironically, the plan was very similar to Wilmington's earlier clustering plan, which the state and suburban boards had so deplored in the remedy hearings.[178] Mary DiVirgilio, a board member critical of the choice, described it as "a delaying action, hoping the court will bail them out."[179] Jeffrey Raffel, political science professor at the University of Delaware and a member of the Delaware Committee on the School Decision, a state advisory group, said "it would have been a miracle" if board members had voted for anything but the intermediate plan, given that the board's expansion to thirteen members meant "it represented districts more than it [did] parents and students." "The court realized that," Raffel said, referring to the judges' decision to have five members jointly represent all eleven districts.[180]

In response to a strong plea by Wendell Howell, the new board delayed its decision on student assignment. Most board members favored a "center plan" that would turn all middle and high schools in Wilmington and De La Warr into single-grade centers for grades five and nine. But Howell called the plan "consciously discriminatory" and "punitive" against both black students and city teachers who could lose their jobs if they weren't qualified to teach fifth or ninth grades.[181]

Two weeks later, before a capacity crowd of over one thousand, Howell outlined his compromise "feeder plan" which would utilize one of the city's two high schools and two of its four middle schools, and which called for suburban children to spend from one to four years outside their home district.[182] However, white parents objected to the inequity among suburban children; not surprisingly, the board several weeks later rejected Howell's proposal in favor of the single-grade center plan.[183]

Meanwhile state board members had let it be known that they were unhappy with the proposed intermediate plan. The Interim Board reluctantly voted to work on a multi-district plan to satisfy the state.[184] However in early March, the state board unveiled its own plan, prepared by the Department of Public Instruction, calling for the consolidation of eleven districts into three over a two-year period. Student assignments would follow the Interim Board's "center plan," also to be phased in over two years.[185]

The state board drew up its own plan in part on the advice of William Prickett. The board's attorney cautioned that the intermediate plan would not pass legal muster, since the court had considered and specifically rejected a similar cross-district busing proposal (Wilmington's clustering plan). The specific choice of a three-district plan, the state board said, followed from the desire to reduce differences in per pupil assessed valuation as much as possible.[186]

The Interim Board responded by announcing plans to develop a compromise six-district scheme. Superintendents from the eleven districts began preparing the latest plan, amid charges from Wendell Howell that it was merely a ploy to "preserve more superintendents' jobs."[187] However, the new board unexpectedly failed to complete the compromise before the deadline for presenting it to the state. State board president Jones said he was "sick over having to make [a decision that] should have been made [by the Interim Board]."[188] Interim Board president Scarborough was equally critical: "I think we've failed miserably."[189] Scarborough said he felt the remedy order showed "a court that wanted to bend over backwards" to let state and local school officials figure out how to desegregate.[190] (The Interim Board finally completed the compromise plan several weeks later, but it was largely an exercise in futility, since the state board had already approved and sent to the General Assembly its three-district plan.)[191]

The Interim Board closed up shop soon after (it was formally dissolved the following July), amid a general feeling that it had failed. Most people traced the problem to the board's expanded size, which assured that members would be more concerned with their own home districts than with the integrated school district they were asked to construct. The dominant role of the Superintendents Council in board planning only made the parochialism worse.[192]

The board's actions (or inactions) inevitably turned on considerations of politics rather than educational quality. (When a suburban superintendent, serving as a panel member at a humanities forum on desegregation, was asked "Where are the values?," he missed the point, responding, "Yes, I wanted to say something about property values.")[193] Even the head of the Superintendents Council commented that "the pure raw politics of the situation has inhibited any decision."[194] There was also a technical or "engineering" bias on the part of board members (more than half were employed in the chemical industry), which led them to view citizen input as a hindrance, not a help.[195]

Schwartz Again Denies Delay. In late April, the state and suburban boards again sought a delay in the scheduled September 1977 start of desegregation.[196] Again, the request was denied. Schwartz rejected the defendants' primary argument that the financial uncertainty faced by the local school districts--specifically with respect to their taxing authority versus that of the new superdistrict--made a delay essential. Schwartz said school districts were already facing massive uncertainty because of school spending cuts proposed by the governor, and a stay would not resolve that problem. Schwartz' opinion was issued from the bench minutes after the hearing concluded, an action the judge said "some may feel is cavalier" but that he felt was necessary to help allay the uncertainty about desegregation.[197] In an unusual closing statement, Schwartz scolded educators for playing politics in the case:

> I may regret this remark, but I would be remiss if I did not say that from what I read in the newspapers, and that is all I have to go on. . . I feel much more would be achieved if those responsible for the educative function would stick to their function, if the legislature would stick to its function, and if the lawyers and judges would stick to their functions.

> I am afraid that in part there has been a mixture. I am afraid that those responsible for the educative function have in part played lawyer, and in part played politics; and it is the children that will suffer.[198]

The "But For" Ruling. Two weeks later, on May 18, 1977--a year less a day since the three-judge panel issued its remedy decision--the Third Circuit affirmed that decision, with minor modifications.[199] By a four-to-three vote following an en banc hearing, the appeals court rejected the defendants' arguments: (1) that the Supreme Court's affirmance referred to only part of the district court ruling on violation (Evans II):

> [I]n exercising its review function, the Supreme Court perforce considered both the constitutional violation and its inter-district character. Had the Court disapproved of these lower court findings, it would either have found no constitutional violation, thereby precluding the submission of any plan, or, alternatively, it would have prohibited the filing of an inter-district plan.[200]

and (2) that the affirmance was altered by the Supreme Court's subsequent ruling in Washington v. Davis:

> [I]t remains for the Supreme Court, not an "inferior" tribunal, to entertain this contention.[201]

In reviewing the district court's remedy, Circuit Judge Ruggero Aldisert, writing for the majority, stressed that the "guiding purpose" of the remedial order should be to return "the school system and its students. . ., as nearly as possible, to the position they would have been in but for the constitutional violations that have been found."[202] Then, citing the Supreme Court's ruling in Milliken (and elsewhere) that desegregation does not require any particular racial balance, the majority struck down the district court's language "which can be interpreted as requiring an enrollment of 10-35 percent black students in each grade."[203] The remain of the remedy was approved without reservation.

> We specifically affirm th[e] governance plan and emphasize that prompt compliance by the state may make action by the interim board unnecessary. Moreover, we do not mandate any specific number of districts which the state may create within the area presently encompassed by the defendant districts nor do we require that all the existing districts be reconstituted.[204]

In a lengthy dissent, Circuit Judge Leonard I. Garth argued that the "but for" criterion for fashioning a remedy, which was entirely appropriate, necessitated a remand:

> [I] do not see how the Delaware officials can devise a plan to remedy the continuing effects of past inderdistrict violations until the extent of these effects is determined by the court. After all, it is by no means obvious what the racial composition of the affected schools would be at present if the eight violations found by the district court had not occurred.[205]

The dissenting judge also maintained that the Supreme Court had affirmed only one interdistrict violation--the enactment of the EAA--and that the district court should, on remand, determine whether any of the remaining violations resulted from discriminatory intent, as required by Washington v. Davis.

Response to the "Cut-and-Paste Order." Reaction to the Third Circuit's ruling was mixed. (Because of its patched-together appearance, Delaware insiders dubbed it the "cut-and-paste order.") Wilmington board president Wendell Howell said "[t]he 10-to-35 percent thing was never a major issue."[206] But the mayor of Wilmington said the court's rejection of minority quotas was "unfortunate", since the court did not explain how best to change the existing system.[207] U.S. Senator Joseph Biden was incensed:

> I think they did it just to get the onus off their back and bump it to the Supreme Court. I thought there was a 50-50 chance they would have the guts to face the issue. But they avoided the critical issue. It's outrageous.[208]

Governor du Pont called the decision "a stunning example of judicial craft at its worst. . . unclear, confusing and contradictory . . . a very murky opinion which evades the tough question of how to comply with its own mandate."[209]

The governor urged compliance by voluntary desegregation: "Since the Court of Appeals struck down racial quotas in any district, school or classroom, it is important to test the feasibility of the voluntary plan to fulfill the requirements of the order, whatever they may be." [210] Other officials also expressed hope that voluntary desegregation might now be a legally acceptable alternative. Despite confusion about the meaning of the ruling, one thing was certain--the defendant school boards would appeal it to the Supreme Court as quickly as possible.

To add to the confusion, while Delaware officials were reacting to the Third Circuit opinion, the Wilmington Board was petitioning Schwartz to reject the Interim Board's "center" plan for pupil assignment in favor of a "modified Plan C"--identical to the "feeder" plan the new board had rejected earlier in the year.[211] Without discussing the merits of either student assignment plan, Schwartz denied the Wilmington board's request as "premature", since no formal plan was before the court. He said Wilmington might want to file its request at a later time.[212]

A "Time-machine Approach to Desegregation. Prompted by the Third Circuit's "but for" ruling and, in part, at the request of Governor du Pont, the state board began considering a totally new plan--one based on a re-creation of Wilmington's racial composition in 1968, the year the EAA was passed. State board attorneys, staff, and local superintendents undertook to search through old records to extrapolate what the racial makeup of the Wilmington schools would have been without the EAA and other state actions labeled discriminatory by the court.[213] Interim board president Scarborough described the state's effort as "pure speculation."[214] Louis Lucas agreed, calling it a "time-machine" approach, which courts in other school desegregation cases had rejected.[215]

The state board submitted its plan to the governor a month later--a scheme to bus more than 6,000 black Wilmington students--47 percent of the district's enrollment--to ten suburban districts, with no suburban students to be bused. The board also reversed its previous stand favoring district consolidation, and recommended that the boundaries of the eleven districts remain intact. Under the proposed one-way busing plan, city schools would go from being 85 percent to 70 percent black, with suburban schools becoming about 16 percent black.[216]

The plan was based on the state board's assessment that, of the eight specific actions which the three-judge court said were discriminatory, only three significantly affected the racial makeup of the schools: segregation in public housing, descriminatory private housing policies, and transportation subsidiesfor private school pupils. To counter these actions, the board recommended (1) busing all black students in public housing to suburban schools, (2) busing 32 percent of the black school population, and (3) eliminating the transportation subsidies for private school students. The board concluded that the EAA had no effect on racial composition of the schools, since Wilmington wouldn't have been consolidated even if the law had allowed it.[217]

The plan offered no explanation for the decision to bus 32 percent, rather than some other number, of black students. In response to subsequent criticism, state board attorney Mason Turner said "there's no magic" in the figure. "We had to come up with a number, and it had to be a significant number."[218] Other critics said the plan should have sent some white suburban students into city schools, since Wilmington schools might not be heavily black had white families not left the city.

Eight days later, the General Assembly's Special Legislative Committee on School Desegregation released its own one-way busing proposal--a "reverse volunteerism" plan which would send all of Wilmington's 11,350 black students to suburban districts unless they elected to remain in city schools. Wilmington teachers would also be transferred to suburban schools based on the number of black students transferring out of the city.[220]

James A. Venema, president of Delaware's leading anti-busing group, the Positive Action Committee (PAC), lambasted both one-way busing plans for going overboard. Venema said the state should give Schwartz nothing more than a purely voluntary plan; if he rejected it, the onus would be on him to impose a "forced busing plan." "Let the courts pull the trigger," Venema said.[221]

Meanwhile, Judge Schwartz agreed to hold another week of hearings on the case beginning July 18. Schwartz' action came in response to defendants' third request for a delay in starting desegregation and the plaintiffs' second request for consideration of a Wilmington-drafted plan.[222]

Hanging or Suicide? On July 14, as required by court order, the state board filed a formal report with Judge Schwartz. The report contained the board's proposed one-way desegregation plan, modified from its earlier form to incorporate the reverse volunteerism concept. (In the report, the state said that it was not "feasible" to determine what the racial composition of the schools would be "but for" the constitutional violations, but that the proposed plan represented a "practical and realistic response" to the Third Circuit's mandate.)[224] However, the General Assembly had not given its stamp of approval to the plan, nor had it granted the state board the necessary authority to implement it.[225] Several weeks earlier, when Judge Schwartz had suggested that the board ask the General Assembly to pass the necessary legislation, board attorney William Prickett replied, "That's like saying, 'we're going to hang you, so why don't you go out and commit suicide?'"[226]

So that Schwartz could consider the state board's plan in an "appropriate procedural context", he requested that the board move to have the plan adopted by the court. Accordingly, the motion was filed under objection, and with the state board's qualification that it opposed any interdistrict remedy.[227]

The July Hearings: Reverse Volunteerism. On July 18, Schwartz heard arguments on the state board's request for a stay; July 19-25 were devoted to hearings on the board's one-way plan. The Wilmington plaintiffs, who opposed both the state board's plan and the motion for a stay, also tried to introduce their own proposal--Plan Q. While Schwartz did not accept their plan into evidence, he allowed the plaintiffs to present it.[228] Desegregation expert Gordon Foster described Plan Q, a cluster-type scheme that would require suburban students to spend two to three years in city schools and city students to spend nine to ten years in suburban schools.[229]

Throughout the hearings, the suburban districts took the position that the existing voluntary transfer legislation was sufficient to comply with the court mandate, but that as a second choice, the state board's plan was acceptable.[230] A recurring topic of discussion was whether Schwartz had the authority to reject both the state board's plan and the single-district plan, and come up with a new plan of his own. Schwartz expressed serious doubts that he could do that; plaintiff attorneys generally argued that Schwartz could; Prickett and other of the defense attorneys maintained that he could not; and some suburban district attorneys took the position that Schwartz could modify, but not totally change, his two basic options.[231] It appeared that the defense attorneys, recognizing that Schwartz would not approve the state board's proposal, wanted to force him to order the single-district plan; defense attorneys presumably considered that remedy excessive and felt it would improve their chances for a Supreme Court reversal. [232]

Schwartz Proposes a Compromise. Minutes after the hearings ended, Schwartz tried privately to work out a compromise desegregation plan.[233] Details of the proposal still remain secret, but Schwartz apparently called both sides into his chambers and told them that each had a lot to lose: the plaintiffs might well lose in the Supreme Court and the defendants had already lost and couldn't be optimistic.[234] The judge also laid out a set of "guidelines" for a compromise plan.[235]

But the compromise effort fell through within hours, when Wilmington board members turned it down. Board president Howell said Schwartz was simply "trying to get off the hook. . .," and that the compromise plan, which he felt implied one-way busing, was unfair to city children.[236] The board also felt the procedure used to discuss the compromise "was improper."[237]

Evans IV: No One-Way Busing

Less than two weeks after the hearings ended, on August 5, 1977, Schwartz ruled that the state board's plan was unacceptable, but that a limited stay of implementation was warranted.[238]

Schwartz first considered the board's plan, since he felt it was impossible to evaluate the injury from denying a stay without first deciding what plan would be taking effect. Schwartz made it clear that he felt he did not have the authority to order a plan of his own:

> The mandate of the Third Circuit contemplates only two possibilities: (1) action by the State enacting its own plan for desegregation; or (2) appointment of the New Board and implementation of the one-district plan.[239]

By the same reasoning, Schwartz concluded that he could not consider the merits of a state board proposal that lacked state legislative approval and that would require a federal court order to implement.

Schwartz went on to consider the plan arguendo, and concluded that the result--finding the plan unacceptable--would be the same.

> The most obvious and significant flaw is that the proposal places the entire burden of the remedy on those whose rights have been violated. . . . One would find it difficult to create a more graphic paradigm of an inequitable remedy than one which assigns to those who have been wronged the responsibility of correcting those wrongs.[240]

In addition to being inequitable, Schwartz found that plan did not meet the Green standard of "promis[ing] realistically to work now."[241]

> [N]o one knows what the plan promises to accomplish. Indeed witnesses from the State Department of Public Instruction expressly declined to predict the results of implementing the plan and disclaimed any conclusions that could be inferred from the history of the voluntary transfer program.[242]

Having found the state board plan unacceptable, Schwartz then considered whether to grant the requested stay, or to order the implementation of the one-district plan as scheduled. Several factors led him to decide this "exceedingly close question" in favor of granting a limited stay pending Supreme Court disposition of the existing appeal.[243] Most important, the Supreme Court might well decide to review, and perhaps reverse, the case. Schwartz noted that a number of cases, decided by the Supreme Court since it summarily affirmed Evans, required a showing of discriminatory intent.

> In my opinion, those cases do not apply [here]. I recognize, however, that in . . . this case, it is not my opinion that counts, but rather that of the Supreme Court.[244]

Moreover, Schwartz concluded that if their appeal was ultimately successful but the stay was denied, defendants would suffer "irreparable injury" resulting from having to unscramble the single-district consolidation and from the disruption to the education of sixty thousand school children.[245] Finally, Schwartz decided that while the harm to plaintiffs from continued delay was a serious injury, (offset only in part by the voluntary transfer program), there was a compelling public interest in avoiding the kind of uncertainty that breeds tension and social conflict--uncertainty which would only increase if he denied a stay, given the possibility of Supreme Court reversal.[246]

Schwartz limited the stay to implementation of the one-district plan for grades 7 through 11 (previously scheduled to take place the following month). Consistent with the Third Circuit mandate, he ordered the state board to appoint a five-member "New Board" which was to begin immediate development of the one-district plan approved by the appeals court. (In calling for a five-member "New Board" the Third Circuit was apparently unaware of the existence of the Interim Board. Schwartz chose to ignore that fact in directing that the New Board members be appointed--no doubt in part because of the Interim Board's history of problems.) Also consistent with the higher court mandate, Schwartz gave the state board responsibility for developing a timetable for transferring authority to the New Board. He directed that the two groups work in close coordination, with the New Board to submit biweekly progress reports to him and file its plan (together with a list of differences between the two boards and competing positions) in eight weeks (September 30, 1977).[247]

The ruling drew a mixed reaction. Governor du Pont called it "sensible."[248] Wendell Howell said he regretted Schwartz' decision to delay desegregation, but was glad to see the judge "acknowledge the importance of a two-way busing plan."[249] PAC president James Venema felt the stay would give his group the time it needed "to ring the final bell on forced busing."[250]

The New Board Goes to Work. Within a week of Schwartz' ruling, the new five-member board had been appointed and sworn in, and had selected officers and given itself a name--the New Castle County Planning Board of Education (Planning Board).[251] Members, and the districts they represented (as specified in the Third Circuit order) included:[252]

Gilbert S. Scarborough, Jr., president (Alfred I. du Pont, Claymont, and Mt. Pleasant). Headed the old Interim Board; president of a Wilmington insurance company; very active in civic and education work; president of a suburban district school board; age 52.

William Clark, vice president (Newark). Chemist; president of the Newark Board of Education; former member of the Interim Board; 51 years old.

Mary DiVirgilio (Marshallton-McKean, Alexis I. du Pont and Stanton). One of the Interim Board's most outspoken members, often criticizing her colleagues for playing politics; suburban school board member; real estate agent; age 43.

Wendell Howell (Wilmington). 34-year-old president of the Wilmington board; member of the old Interim Board; professional counselor at a Wilmington community college.

Earl J. Reed, Jr. (New Castle-Gunning Bedford, Conrad and De La Warr). Only one of the five who did not serve on the old Interim Board; president of a suburban school board; vice-president of Gracelawn Memorial Park; age 45.

During its first month of existence, the Planning Board appointed five superintendents to a "planning team" charged with preparing a pupil assignment scheme,[253] voted to take a neutral legal position in the Evans suit (Wilmington wanted Schwartz to make the board a defendant),[254] and approved 3-to-2 a proposal to subdivide the consolidated district into four "attendance areas."[255] In what came to be a familiar voting pattern, Wendell Howell and Mary DiVirgilio opposed the proposal (Howell wanted no subdivisions; DiVirgilio preferred to approve a student assignment plan before drawing attendance areas.)[256]

Some of the harder decisions were made closer to the deadline for submitting the plan. A three-member majority of the board approved a student assignment plan that would send white suburban students into Wilmington or De La Warr schools for two consecutive years, with black students spending ten years in predominantly white suburbs. Howell and DiVirgilio opposed the "10-2" plan, charging that it discriminated against the two majority-black districts.[257] The board also decided to recommend that Schwartz give it the authority to set taxes at the highest rate in the district--$2.94 per $100 of assessed valuation (the lowest rate in the area was $1.04)--though this would not mean the board favored setting the rate at that level.[258] This was consistent with an EAA provision which authorized a newly reorganized school district to set a tax rate sufficient to provide "the highest per pupil expenditure level of any of its component former school districts."[259]

The Planning Board submitted its 10-2 plan on September 30, and Judge Schwartz scheduled hearings on it to begin October 18. Wendell Howell submitted a minority report containing Plan W, essentially an 8-4 assignment scheme, but with considerable variation from the average. Plan W also called for closing twenty-four to thirty schools, all but one of them in the suburbs. The majority plan, by contrast, sidestepped the school-closings question, saying the board must first study the impact of enrollment drops. (The board's first-draft plan called for closing only schools in the city or De La Warr.)[260]

Supreme Court Declines Review--Again. On the following Monday, the Supreme Court declined to review the Third Circuit's ruling upholding the remedy order. The high court's fourth ruling (since 1975) in the Wilmington case was a 4-to-3 decision. Justices Burger, Powell, and Rehnquist dissented, saying they would have asked the appeals court to review the case further in light of the Supreme Court's decision in Dayton.[261] (Justices Marshall and Stevens abstained; observers noted that Marshall, a former NAACP official, often removed himself from cases in which that group is a party, and that Stevens might have abstained because he joined the court after it affirmed Evans in 1975.)[262]

Constitutional law experts disagreed sharply over how to reconcile the action with recent Supreme Court busing decisions. But they agreed that the denial of review--which would set no precedent--had less significance than a decision affirming the Third Circuit after a full review.[263]

PAC president James Venema said the ruling "shocked and surprised" him.[264] Delaware Attorney General Richard Wier, Jr. concluded that "[f]or all practical purposes, busing is here."[265] But attorneys for the state board promised to continue the fight, appealing Schwartz' latest ruling to the Third Circuit.[266]

The October Hearings: 10 and 2. Even before the hearings on the 10-2 plan began, Schwartz made it clear that he wanted the court to intrude as little as possible and expressed concern that he could do that. The administrators who wrote the plan assumed that the court would solve all problems, Schwartz said in a meeting with lawyers to discuss the upcoming hearings, "but I don't know if that's the court's function." As an example, Schwartz pointed to the seeming inconsistency between two provisions of the plan--one which suggested closing a number of schools, the other saying no teachers or staff would lose jobs or suffer pay cuts because of desegregation: "If schools close, there are going to be an awful lot of principals without jobs. Who's going to pay them?" he asked. Schwartz also noted that the General Assembly could, and he hoped would, deal with some of the problems, but that "if not, the court will [have to] pick up the void."[267]

The hearings began October 18 and, as expected, lasted three full weeks. Wilmington won a major victory the first day when Schwartz agreed to hear testimony on Howell's Plan W because "the court does need the alternative." Schwartz made clear that he found "problems with the [10-2] plan as presented."[268] He also reiterated that, while he lacked authority to approve anything but the one-district plan, the state legislature could still reorganize the districts some other way.

> [I]t is no secret to anyone that there is grassroots sentiment in the community over this question. Now, if the community is interested in maintaining more control, direct control, over its schools through smaller districts, then I think the proper route is through the Legislature.[269]

For its part, the black community voiced an unusually united sentiment against the proposed 10-2 plan. A newly formed alliance of more than twenty of Wilmington's often divided black leaders--who said they were "burying old arguments in an effort to protect our children"[270]--staged a rally and march to the slogan "Ten and Two Will Never Do." In addition to the busing of blacks for eight years longer than whites, the alliance objected to the planned conversion of predominantly black high schools into two-year facilities (either fifth and sixth or eighth and ninth grade centers).[271]

The first days of the hearings focused largely on the financial costs of desegregation, an issue which Schwartz felt was of grave importance: "It can get to the point where the plan will fail because of costs." Acknowledging statistics showing almost thirty thousand empty spaces in the eleven districts, Schwartz stressed the money-saving potential of closing schools: "If you're facing a significant tax increase, you can save about $150,000 per school by closing schools. For 30 schools, that's $4.5 million."[272] He also noted the "Catch-22" character of trying to decide which schools to close without first making pupil assignments, or vice versa.[272a] Recognizing that the Planning Board was already doing "a thankless task as far as the community is concerned," and that closing schools would "simply add to their unpopularity," Schwartz nevertheless directed the group to grapple with the job:

> [I]f I am going to be requested to O.K. a tax rate or give the authority for setting [one], I'm going to have to be satisfied that the Planning Board is running a very tight, businesslike ship. It will have to be done, and I will be looking very closely, so you might as well come to grips with it.[274]

Schwartz also told desegregation planners they must face the problem of whether or not to level-up teachers' salaries, given the estimated cost of $22 million.[275] The Planning Board did not recommend leveling-up, and while Schwartz did not necessarily favor it, he was skeptical that it could be avoided:

> . . . I am not a labor relations person, I am a judge--[but] . . . if my hunch is correct, that teachers will not work beside each other at vastly different rates of pay, . . . [then the practical result] is in fact leveling up.
>
> Now, if I am wrong I would like to be told why I am wrong. None of the suburban counsel have raised it. The

> State Board Counsel had not raised it. But there is a problem [that I have] to be worried about because you have put me in an adversary role where I don't like to be. . . . [E]verybody is focusing on pupil assignment [but not on] these other things [like leveling up].[276]

As further illustration of his concern with cutting the cost of desegregation, Schwartz ordered that no staff contracts be renewed or extended beyond June 30, 1978, to prevent the existing eleven districts from "loading up" on personnel whose salary costs would burden the new district.[277] (Schwartz' interest in staffing policies also extended beyond his concern with saving costs. He asked one witness whether there was any way to retain teachers on the basis of classroom performance rather than strict seniority.)[278] And to guarantee that the state would pay its share of desegregation costs even if the legislature refused to appropriate the money directly, Schwartz permitted State Treasurer Thomas R. Carper to be added as a defendant.[279]

Early in the hearings, Schwartz asked the attorneys if they thought they could settle some of their differences out of court, "so that we could get on with the business of education instead of litigation."[280] The judge made it clear that he was not "interested in avoiding a decision" but rather in reaching one so as to "get on with the case."[281]

> What a settlement would promote would be stability . . . [but] if the parties don't want to settle, I could care less. It's really that simple. If they want to talk and see if they can reach a common meeting ground, then I think it should be done. But I'm not going to ask them to do it if there is no basis for reaching a common meeting ground. You can't settle with each party getting everything that they want.[282]

Paul Dimond responded to Schwartz' probe with a procedural suggestion--that the court appoint George Kirk (Newark superintendent; chief staff member for the Planning Board; white) and Joseph Johnson (Wilmington superintendent; black) to work out an acceptable compromise desegregation plan.[283] (A Tampa, Florida educator had earlier testified that a black and white administrator in that city worked out a plan that received strong community support.)[284] However, the school boards were cool to the suggestion of settling in that manner, and the idea was soon forgotten.

Schwartz Tries for a 9-3 Plan. Schwartz approached his next try at compromise in a very different manner. Dissatisfied with both the Planning Board's 10-2 and Wilmington's 8-4 plans (suburban districts still maintained that a voluntary transfer program was sufficient), Schwartz proposed consideration of a 9-3 plan. To determine objectively if such a design was feasible, the judge directed George Kirk to try to develop a 9-3 plan by November 15.[285] Schwartz specified that the plan should utilize a Wilmington (or De La Warr) high school as a 10-12 grade center. He also suggested that it offer the full span of grades 1-9 in Wilmington. The actual work fell to a group of five staff members from the existing districts known as the Student Assignment Committee (SAC). Schwartz had the committee members put up in a jury room, where they could work without interruption, and bound by a gag order, so they would not have to justify what they did to their employer districts. The judge also gave the committee "lots of moral support," but other than that, stayed out of their work.[286]

Working at a thankless task--since any 9-3 plan would be opposed by Wilmington as too lax and by the defendants as too harsh--the staff members grew very close to one another as they labored in total secrecy for nearly a month. As one of the five put it, "The committee developed a rapport the likes of which will last the rest of our lives. When we finished, it was like a family breaking up."[287]

Meanwhile, as the hearings continued, Schwartz issued repeated directives in an effort to speed the desegregation planning process. Among other things, he directed that:

- George Kirk be immediately relieved of his duties at Newark to work fulltime on desegregation planning;
- the Planning Board begin collective bargaining elections to decide which union would represent teachers in the new district; and
- Kirk begin coordinating curricula among the eleven districts, using as many other staff members as necessary.[288]

The hearings came to a close--to be resumed in late November to consider the 9-3 plan--capped by two significant events. One, the Supreme Court, by a 7-0 vote, Justices Marshall and Stevens abstaining, denied the state's request to reconsider its appeal. (Kurland had advised the state to request a rehearing; he felt that since only seven justices had participated in the previous decision, the three votes cast for review might have been sufficient.)[289] Two, Schwartz allayed suburban school districts' fears by announcing that desegregation would begin in September 1978. He rejected either a January or April starting date as "educationally unsound and administratively undesirable."[290]

Lawmakers Want Schwartz Fired. Meanwhile, state legislators were busy in Dover expressing their anger toward Schwartz. The Delaware house passed a resolution calling on President Carter to fire the judge. The measure, which criticized Schwartz for his rulings on school desegregation and prison overcrowding, charged that "the likelihood of a revolutionary change in the Delaware public school system has interfered with the function of that system," and that the state will have to spend "many millions of dollars" on prison construction, even though the federal prison system is even more overcrowded.[291]

The house minority leader said the resolution "reflect[ed] poorly" on the legislators, since the president has no power to remove a federal judge. He recommended instead asking the state's congressional delegation to initiate impeachment proceedings against Schwartz.[292]

Another proposed resolution requested the state attorney general to replace state board attorney William Prickett, since the state "has lost each and every round" in the Evans court battle. That same sentiment was expressed repeatedly over the course of the suit, but never heeded.[293]

The December Hearings: 9 and 3. When court resumed on November 29, the SAC had completed its task, presenting Schwartz with three basic 9-3 concepts and several variations on each. Committee member Dennis Carey, and aide to Newark Superintendent George Kirk, presented all of the plans; when Carey was unable to answer a question, Schwartz would ask if any of the other four SAC members, who sat in the first row, calculators in hand, knew the answer.[294] (One of them said later, "I've always thought courts ought to work that way.") The committee retained a neutral position in presenting the plans; members refused even to rank the various 9-3 plans, choosing instead to present the "advantages" and "disadvantages" of each. Throughout the hearings, Schwartz praised the work of the group and tried to protect the members as best he could from the attacks on a 9-3 plan by both plaintiffs and defendants.[295]

Schwartz told the Planning Board he hoped they would adopt the compromise 9-3 plan, since he would rather have local planners agree on a plan than to order one himself.[296] But the board stuck with its 10-2 proposal, and to suburban districts, the 9-3 plan increasingly became the enemy. Some observers speculated that had the suburban districts supported the 10-2 plan in the October hearings, rather than maintaining that a voluntary transfer program was sufficient, Schwartz would have accepted that plan.

Schwartz also resolved the "Catch-22" problem of whether to close schools before students are assigned or to assign students and then close schools. "I'm prepared to break that knot," Schwartz announced in the hearings. "School assignments should come first." However, he stressed that the details of the assignment plan would not come from him: "Under no circumstances, while I might adopt a [desegregation] concept, am I going to direct that certain schools be used for certain grades."[297]

Meanwhile in Dover. Prompted by Schwartz' suggestion in October that the legislature could still act to reorganize, the state board asked Governor du Pont to call the General Assembly into special session for that purpose.[298] The Delaware School Boards Association and the state PTA soon endorsed the board's call for a four-district bill.[299] But PAC urged the legislature "not to enact any compromise forced busing plan." "[T]here is little or no difference between a single district or a four-district plan," said James Venema in a letter to all legislators. "The disastrous effects would be the same."[300]

Du Pont's initial response to the board's request was cool.[301] But six weeks later, the governor reversed his stance and called the General Assembly into special session to come up with an alternative to the one-district plan. "Either we must seize the initiative and reorganize school districts in New Castle County, or a federal court will merge, operate, finance and establish the tax rate for these school districts while we stand helplessly by as observers," du Pont said in a press conference. "In other words, the court will run the school district."[302]

The debate on the governor's reorganization bill--which called for the creation of four districts and set minimum tax rates for those districts -- centered on four issues:[303]

(a) the effect of legislative action on the state's continued appeals of the desegregation orders: Philip Kurland, and every other attorney hired by the legislature and the state board, told the lawmakers that passing the bill would not jeopardize the state's continued appeals. (However, Kurland stressed that the chances for a favorable appeal were "zero." When legislators pressed him on whether the desegregation order could be reversed, Kurland replied, "Yes, and I might see Santa Claus on December 25.")[304] But the attorney representing PAC insisted that legislative action would make it harder to win later appeals.

(b) the likelihood that Schwartz would accept either the reorganization plan or the tax increase limit: State-paid attorneys maintained that the judge might well accept the plan. (Kurland advised the legislators that if they waited until after Schwartz ruled to act, "You've got yourself in a strait-jacket for a considerable length of time.")[305] The opponents, however, said it was unlikely Schwartz would accept anything from the legislature at that late date.

(c) state attorneys maintained that the governor's plan would save the state $33 million, the cost of raising the tax rate in the eleven districts to the highest level currently paid by any single district. But legislators didn't believe the figures, and challenged the underlying assumption that teachers' salaries would not be raised under a four-district plan.[306]

(d) PAC supporters argued that passing the plan would preclude returning to the eleven-district system should the state eventually win on appeal.

The substantive arguments left Delaware lawmakers uncertain about what to do. The senate president pro tem said he had "never seen the General Assembly so confused."[307] But the key factor underlying the debate was still "politics." Legislators feared taxpayer reaction to any desegregation plan. "We don't want the tax hike (likely to follow desegregation) hung around our necks," was how one put it.[308] PAC exploited that fear by distributing thousands of flyers throughout Wilmington which equated support of the bill with a vote for "forced busing." PAC members roamed through Legislative Hall wearing big yellow tags reading "Keep the Onus on Murray" and "Do Not Admit Guilty by Compromising."[309]

To add to the governor's political problems with the reorganization bill, it came at a time when his relations with Democrats in the legislature had been steadily deteriorating. (One source of dispute was du Pont's prison master plan, itself a result of Schwartz' ruling on prisoners' rights.) Upstate Democrats simply didn't trust the governor, and viewed his bill as a "political ploy, pure and simple."[310] (On top of that, the governor did a poor job of lobbying for reorganization. He failed to appear at his own briefing on the legislation, and some legislators didn't receive advance copies of the bill because the governor's staff put insufficient postage on the envelopes.)[311]

After more than fifteen hours of floor debate, on December 17 the Delaware house defeated a watered-down version of du Pont's bill, 16 to 24 (1 absent). Support came from Republicans and from downstate legislators, who feared that a "monster district" in New Castle County would create pressures for consolidation and leveling-up in lower Delaware.[312] Minutes after the vote, du Pont taped a radio message criticizing the legislators for "abdicating their responsibility" and warning them that they would soon regret their "serious mistake."[313] (Du Pont tried to get a reorganization bill passed again, in early January when the General Assembly returned to Dover. But before the legislature had a chance to reconsider the bill, Schwartz' ruling, expected as early as mid-December, was finally issued.)[314]

Biggs Takes the Helm. Meanwhile, two events occurred in Wilmington worth noting. In hopes of strengthening its position among county teachers, the New Castle County Federation of Teachers sought to intervene in the case. Schwartz denied the motion, and in doing so blasted both the federation and the rival county education association for pushing the notion of leveling-up:

> Teachers should not be penalized, but I don't think there is anything to commend either [union] if they are going to be so avaricious and voracious as to have the effect of frustrating the desegregation decree that has had this community riven now for six years.[315]

On the same day, the Planning Board voted unanimously to offer the job of superintendent of the reorganized school district to Dr. Carroll W. Biggs, the 52-year-old superintendent of the Alfred I. du Pont School District, and chairman of the county superintendents' advisory group to the Planning Board. Biggs was considered a "tough administrator with a propensity for low-profile management."[316] At age 27, with only three years teaching experience, he became one of the nation's youngest school superintendents. Biggs came to Delaware in 1964, after receiving a Ph.D. from Columbia Teachers' College, and rose to become one of the state's highest paid public officials and, many believed, one of the most influential. Viewed as a very political animal--some called him manipulative--as head of one of the state's wealthiest school districts and chairman of the Superintendents Council, Biggs was considered the driving force behind decisions of the Interim Board.[317]

The Planning Board offered Biggs a 10 percent salary increase--to $56,000+.[318] (It was later revealed that, unbeknownst to at least one board member, the Alfred I. district was also paying Biggs a deferred compensation worth more than $10,000 a year.)[319]

Evans V: 9-3; Tax Ceiling

Schwartz issued his much-awaited opinion on January 9, 1978--a 133-page treatment of "the few and relatively narrow remedial issues that remain for decision in this twenty-year litigation"--namely pupil assignment, ancillary relief, and governance.[320] He set the stage by outlining the four "equitable principles" which the Supreme Court set down in Milliken II to guide federal courts' remedial powers in eliminating de jure segregation: (1) ". . . the nature of the remedy is to be determined by the nature and scope of the constitutional violation;"[321] (2) the decree should try to restore victims of discrimination to the position they would have occupied but for the violation; (3) the remedy should take into account the interests of local and state authorities in managing their own affairs; (4) once invoked, the court's remedial powers are broad and flexible. Schwartz noted that since the remedial nature and scope of the remedy had been affirmed "with finality" on appeal, only directives (3) and (4) remained.[322]

Schwartz first dealt with the Planning Board's position that the court lacked authority to assess the "fundamental fairness" of the various pupil assignment plans (8-4; 9-3; 10-2), and was thus bound by the board's preference for the 10-2 plan.[323] The judge concluded that, contrary to its claims, the Planning Board was neither a court-appointed master nor a true body politic, and that he was thus not bound by the group's choice of plan.[324] However, Schwartz added that the board's presence was vital to successful implementation of a desegregation plan, and that the board's input would be accorded increasing weight "so long as [it] continues to seek responsible solutions in an impartial manner. . . ."[325]

Pupil Assignment. Schwartz next described each of the pupil assignment plans under consideration: the 10-2 plan, Plan W (8-4), and four variations on the 9-3 concept. In assessing the merits of each, he elaborated on the equitable principles which guided him. Practicality was a key concern.

> Central to these cases is a recognition that the task of righting discrimination necessarily entails considering not only what is fair but also what is practical.[326]
>
> It follows that the means employed to accomplish desegregation must necessarily be considered against the practicalities and equities of the situation in order to insure that a desegregation scheme is just in application and possesses a reasonable probability of success. 327

Another recurring theme was Schwartz' concern with minimizing the court's role in desegregation:

> Matters of educational programming and quality of education are properly the province of educators, not that of the Court. . . . Accordingly, the Court narrowly visualizes its duty as one of ordering into effect a scheme for desegregation that meets the constitutional goal in a practical and equitable manner.[328]

He stressed that what action he did take was necessitated by state officials' failure to act:

> The State Legislature, although allotted an unprecedented amount of time, has defaulted, not even enacting enabling legislation to permit defendant State Board to address this constitutionally impermissible condition. In addition, defendant State Board fairly can be characterized as channeling its energies toward preservation of its legal position, rather than attempting to redress the constitutional violation. In view of this default, the Court's duty is to implement a remedy, the parameters of which have been established by the three-judge court's primary remedial decree.[329]

Schwartz rejected the Planning Board's 10-2 plan, primarily because it did not satisfy his criterion of "minimizing the disproportionate burden on any racial group. . . ."[330] (He explained that the Board reached the concept of 10-2 by multiplying the percentage of black students (21.7) by twelve grades to reach a figure of 2.6, and "[h]aving arrived at a number closer to three than two grades, the Board arbitrarily chose to assign children from predominantly white districts the lesser number of two years, thereby requiring the reassignment of children from predominantly black districts for ten years rather than nine.")[331] Schwartz found it particularly objectionable that the 10-2 plan would eliminate most grades in the black areas, and that "severe underutilization of city schools [would] inevitably target them for closing."[332]

Next, Schwartz rejected Plan W, the 8-4 assignment scheme, as "hold[ing] scant promise of satisfactory implementation."[333] He identified several weaknesses in the plan, including its reliance on only certain geographic areas, and then for varying number of years, a complex pairing and clustering arrangement that failed to keep students together during the course of their education, and use of an infeasible concept of "regionalization" for assigning high school students.[334]

Finally, Schwartz accepted the 9-3 concept, which, in addition to reducing the disproportionate impact on blacks, also allowed for utilization of existing high school facilities in Wilmington and/or De La Warr.[335] He recommended one particular configuration as superior to the other 9-3 schemes, but left the final choice of a 9-3 design up to the Planning Board.[336] Similarly, he left to the board decisions about which grades will go to which schools,[337] which schools to close,[338] whether to include rising seniors and kindergarten students in the plan,[339] where to reassign teachers and staff, and whether to pay teachers at different salary levels or at one uniform rate with adjustments upward or downward.

> This Court agrees with the three-judge court that previously declined to order "levelling up" because employer-employee relations are uniquely the responsibility of the [Planning] Board.[340]

To give the board maximum flexibility in setting salaries, Schwartz then voided those provisions of the EAA which required leveling-up following reorganization.[341]

Ancillary Relief. After reviewing the legal basis for federal courts to order ancillary remedial relief, Schwartz reiterated his desire to afford local educators maximum latitude in this area:

> In mandating this relief, the substantial authority of state and local officials in managing educational affairs is recognized by according ample latitude to the [Planning Board]. The precise development and actual implementation of remedial relief is left to the discretion of educational authorities.[342]

Schwartz then identified eight "general guidelines for ancillary relief" necessary to remedy the constitutional violation:

*in-service training
*a reading and communication skills program
*instructional materials free of racial bias
*a nondiscriminatory counseling and guidance program
*nondiscriminatory guidelines for review of proposed new construction or school closings
*an appropriate human relations program to dispel racial myths
*code of student rights and responsibilities
*reassignment of staff so as to eliminate racially identifiable schools

Schwartz directed that the costs of these programs be paid by the state the first year and shared by the state and county districts after that.[344]

Governance. To the surprise of many, Schwartz said the Planning Board, which would become the operating board on June 30, 1978, should retain its existing membership until June 1980, "to assure continuity and guarantee that the [board] will have the opportunity to function as a cohesive governance unit. . . ."[345] Beginning then, the term of one member would expire each year, the order to be determined by lot. At the end of a five-year cycle, the board should include one representative from Wilmington and one from each of the four attendance areas adopted by the

Planning Board. (Schwartz made clear that the board was free to adopt a pupil assignment plan employing some number of regions other than four.)[346] The judge stated that assuring that Wilmington would be represented on the board, among other things, enabled him to avoid appointing formal monitors or continually monitoring the desegregation process himself.

> The Court regards the daily business of running the schools, even during desegregation, as peculiarly the function of State and local officials. The inclusion of Wilmington [on the board] assures representation of plaintiffs' interests and facilitates the Court's desire to studiously avoid undue interference with school board functions.[347]

Taxes. Next, Schwartz dealt with the difficult issue of setting a local tax rate. He repeatedly stressed his reluctance to intrude in this area.

> Authorization to set a school tax rate is properly a product of the political process. For that reason, it is my view a federal court should not become involved failing a total abdication of responsibility over a period of time such that further delay significantly jeopardizes constitutional rights.[348]
>
> It is with deep seated reluctance overcome only by the pressing, immediate necessity and the realization that no other option is available to fill the legislative void that the Court becomes involved at all in matters of taxation. Were it not true that the desegregation process faces imminent peril unaddressed by any other practical alternative, the federal court would not intrude. If the political process had provided statutory machinery or a procedure for devising a tax rate for the single district, or if there were not an immediate need to act now, I would further defer the matter of local tax rate authorization.[349]

Schwartz stressed that the General Assembly was free to alter the parameters he authorized.

> Because state political processes are preferred over even limited intervention by a federal court, the Delaware Legislature may raise or lower the tax authorization established here.[350]

But he qualified that offer, using language that would come back to haunt him:

> The Court must caution, however, that any legislative action that lowers the established tax rate below a generally acceptable rate to a point at which the desegregation process would be imperiled will be received skeptically. Given the historical stance of the Legislature, if such a lowering occurs, the usual presumption of legislative regularity will not attach.[351] (emphasis added)

Consistent with his "principle of minimizing federal intrusion," Schwartz rejected the notion of actually setting the tax rate himself, a function properly carried out, as specified in the EAA, by the school board of the reorganized district.[352] Instead, he specified a maximum tax rate that the board would be authorized to set. Schwartz rejected the figure proposed by the state as dangerously low, and the Planning Board's recommended maximum as unnecessarily high.[353] He then carried out a detailed and lengthy analysis to determine a reasonable maximum tax rate. As a "controlling principle," Schwartz said he sought to use his discretion "in accordance with State law, always remaining mindful that the beleaguered taxpayer ought not to incur a tax increase beyond that absolutely essential for effective reorganization."[354] His concern for the "beleaguered taxpayer" was above all pragmatic, since he recognized that "if the cost of public education to the local taxpayer becomes unrealistically high, the entire desegregation effort could totter and ultimately crumble under the heavy financial weight associated with it."[355]

Calculating the Tax Ceiling. Schwartz rejected the state board's position that the maximum tax rate for operating expenses should be based on current expense tax revenues plus 10 percent, since that would likely result in an actual reduction in per pupil expenditure.[356] (Many districts had been spending extensively out of reserves.) The judge also rejected the Planning Board's claim that, in keeping with the EAA, it should be authorized to establish an operating expense tax rate of up to $2.669, Wilmington's current rate. Three facts caused Schwartz to rule against the Planning Board, even though its position complied with Delaware law as well as with "this Court's philosophy of placing maximum flexibility in the [Board]: (1) the Planning Board had conceded that the tax rate it requested to set was neither necessary nor realistic; (2) Wilmington's rate of $2.669 was an aberration--almost double the rate of the next highest district; and (3) the Wilmington rate, "set without the inhibition of a referendum," could not be said to represent the popular will.[357]

Having declined to adopt Wilmington's tax rate, Schwartz considered the next highest district--Alexis I. du Pont. But he concluded that due to an extraordinarily large tax base, that district too "may more reasonably be considered an aberration than a suitable model. . . ."[358] Instead, he used the rate for Mt.

Pleasant, the third highest, to arrive at a maximum operating expense tax rate for the consolidated district of $1.91.[359] (The opinion details the extensive calculations made to arrive at that figure.)

The tax rate ceiling for tuition, debt service, and minor capital improvements was less controversial. Since those items constitute necessary obligations and are relatively fixed, after careful review Schwartz accepted the Planning Board's calculation that an equalized rate for those items would be $.32.[360]

Having put a ceiling on the total tax rate of $2.23 ($1.91 plus $.32), Schwartz pointed out that if the maximum rate were set, one district would experience an increase of 114 percent, in school taxes, and six others would see their bills raised well over 50 percent.[361] Thus he strongly cautioned the board not to use its full range of taxing power during the early years of governing the single district since "additional authorization will not be granted except for unforeseen circumstances over which the [board] has no control. . . ."[362] Recognizing the "widespread nature and potential severity" of the tax increase, Schwartz ordered the Planning Board to set the rate by the following month, so that property owners could budget for it.[363]

Reaction to Evans V. The legislature was not long in responding to Schwartz' latest ruling. In addition to urging the state to appeal the court order, the General Assembly introduced legislation to:[364]

* expand the Planning Board to include a representative from the state;

- * authorize a referendum asking voters if they favored continuation of compulsory public education in Delaware (an amendment was considered to give parents vouchers which they could use to send their children to private schools);
- * make it a state crime for a federal judge to interfere with Delaware schools. The bill provided for fines of $20,000 to $40,000 and/or five years in prison.

Nor did the teachers waste any time in announcing that, despite Schwartz' tax rate ceiling, they would continue to press for leveling-up. (To suburban teachers, equalization with Wilmington's pay scale would mean an additional $2,770 to $4,434 a year in salaries.) Planning Board president Scarborough said flatly that leveling-up was not possible; he personally favored leveling-down for some teachers rather than paying comparable teachers at different rates. Scarborough also acknowledged that Schwartz' tax ceiling was an unexpected blessing: "I have said for some time that the way to control salary costs is for a tax-rate limit to be set before negotiations begin. But I didn't know the answer. I never dreamed Judge Schwartz would give us the answer."[365]

PAC Gets in Its Two Cents Worth. PAC took great glee in discovering a minor error in Schwartz' calculations (he relied on a state exhibit which mistakenly included the technical high school in enrollment figures) which, when corrected, made his tax rate ceiling two cents lower.[366] Schwartz acknowledged that his method of determining a tax ceiling was "less than 100 percent accurate," but declined to alter his order.

> Were the Court actually setting a tax rate, the new data would be of marked significance. But for reasons previously stated, the Court's participation has been far less intrusive.[367]

Schwartz said that since he expected the Planning Board to set the initial rate significantly below the maximum authorized, little could be gained by recomputing it. (Informally, the board had said the rate would likely be set at about $1.97--well below the judge's $2.23 maximum.) In that same order, Schwartz rescinded his ceiling on tuition and capital improvements ($.08), effective in 1979.

> The [Planning] Board points out that a check and balance system is operative by virtue of statutory provisions prohibiting indiscriminate spending from these accounts. . . . Having placed broad authority in the [board], the Court will permit [it] to set the tax rates for tuition and minor capital improvements in future years.[369]

Not to be outdone, the General Assembly's Legislative Committee on Desegregation came up with its own figures--$1.61 as an operating expense tax maximum, but with a recommended rate for the following year of $1.47. To arrive at its tax cap, the committee used Schwartz' basic formula (per-pupil expenditure times number of students), but where the judge used expenditure figures for Mt. Pleasant, one of the county's richer districts, the committee substituted an average per-pupil expense rate for the entire desegregation area.[370] The legislature soon after approved S.B. 457, which provided for calculating the tax rate in that way.[371]

At the same time, the General Assembly passed a measure to eliminate the Planning Board and provide for a four-district desegregation plan. Drafted by the Department of Public Instruction, the plan was designed so as to satisfy Schwartz' criteria for a desegregation scheme--full grade span offered in Wilmington, use of a Wilmington or De La Warr high school, and adherence to a 9-3 plan. (The state school superintendent said that each of the four districts would have to work out its own 9-3 plan within its boundaries.) Nevertheless, state attorneys conceded that it was a "reasonable prediction" that Schwartz would reject the legislature's action as tardy.[372]

The judge did just that, though gradually. Schwartz' first responded to the developments informally. At a hearing, he told attorneys that "[u]nless and until the court order is changed, this [four district] legislation means nothing." He told the Planning Board that it had "only one job: to proceed under the court order as it exists." Schwartz also said that he couldn't change the order anyway, since it was on appeal to the Third Circuit.[373] (The state board's attorney said later that he would not ask the appeals court to send the case back, since that might delay the appeal hearing then scheduled for May.)[374]

Evans VI: No Four-District Plan

A week later, Schwartz issued a temporary restraining order, to halt the state board from continuing to plan for a four-district reorganization; he extended the order ten days later. On March 15, Schwartz issued an opinion which (1) granted the Planning Board a preliminary injunction against implementation of the four-district plan; and (2) refused to consider the plan formally, since his January order was on appeal.[375]

In discussing the consequences of denying an injunction, the opinion left little doubt that the four-district plan was unacceptable. First, Schwartz chastized the legislature for its tardiness:

> The action by the Legislature came significantly later than would have been expected by the Court or, for that matter, by anyone remotely familiar with the case.[376]
>
> It is an understatement to say that when the Legislature acted in mid-February 1978, almost two years after the invitation of the three-judge court, it created practical problems. An element of uncertainty and confusion was added to a highly emotional subject already bewildering to even the best informed citizens of this area.[377]

Next, he questioned how realistic certain provisions of the plan were, and noted the delay that would necessarily result from investigating their feasibility.

> Indeed, the Court is now urged by persons who vehemently argued that a 9-3 fit was impossible in one systemwide district, that a 9-3 plan is entirely possible in each of four districts despite capacity constraints resulting from the inability to cross district lines. Presumably this miraculous conversion would be probed at some length during hearings on the Four District Plan.[378]
>
> (T)he existence and efficacy of an enforcement mechanism to coordinate the four districts must be demonstrated. . . The parties will also have to confront not inconsequential challenges to the governance scheme. . .(I)t must be demonstrated that the new boards, which have not participated in the planning process, possess the sensitivity and resources to develop adequate ancillary programs. . . A showing must be made that (the proposed tax) rates do

> not themselves imperil the desegregation process and that the differential of some thirty percent between districts comports with an equitable decree and will not frustrate or impede the desegregation process.[379]

Schwartz perceived that he faced two clear choices:

> If an injunction is granted, the harm suffered is that a legislative will. . ., expressed in dilatory fashion by a Legislature that has many times voiced its desire to stymie the overall desegregation effort, is frustrated.
>
> In contrast, if no injunction is issued, the (Planning Board) is dissolved and the hastily formed Four District Plan which has as yet not been shown to be feasible, equitable, and legally sound represents the only blueprint for education in the desegregation area.[380]

If he denied the injunction, Schwartz said, "nothing but chaos and confusion will result."[381]

Accolades and Insults. Schwartz took time out from his work on Evans to accept the 22nd annual Good Government Award from the Committee of 39, a group of prominent, liberal Wilmingtonians. A band of sign-carrying protestors marched peacefully outside the Hotel du Pont where Schwartz accepted the award.[382] Not long before, Schwartz had been nominated "Delawarean of the Year" by News-Journal columnist Bill Frank.[383] Local citizens protested that honor as well — with a barrage of letters to the editor. One nominated Schwartz (everyone calls him Murray) as "Judicial Quack of the Year." Another nominated columnist Frank "obnoxious journalist of 1977" for having honored Schwartz.

The April Hearings: Taxes. Following the legislature's approval of S.B. 457 — setting forth a formula with which to determine a maximum tax rate — the state board had fixed the rates for operating expenses for each of the four districts, ranging from $1.343 to $1.685.[384] (The board had also determined a rate for minor capital expenditures, tuition, and debt service.) Although S.B. 457 also provided for determining a tax ceiling for the single district, the state board did not formally set that rate. Instead, the board's finance director, James Spartz, submitted an affidavit specifying a maximum rate of $1.527 for operating expenses. The state board then tried to enjoin the Planning Board from setting a rate in excess of the amount to be fixed by the state board (presumably $1.527). But in the interim, the Planning Board established its rate for operating expenses as $1.68 (plus $.29 for other expenses, for a total of $1.97).[385]

Schwartz held hearings on the state board's request for an injunction on April 11, 12, and 13, 1978. At the close of the proceedings, the state board actually set the rate at a higher level than it had originally indicated — $1.585;[386] it was this higher figure that Schwartz analyzed in his opinion.

Evans VII: Legislature's Tax Rate

Schwartz framed the issued before the court as "whether S.B. 457 as implemented by the state board provides a taxation scheme likely to frustrate or imperil the desegregation process in the single school district."[387] He concluded that it did.

Repeating his earlier warning, Schwartz dispensed with the state board's contention that the rate it determined according to the statutory procedure could not be upset because of the special deference normally paid to legislative judgments in the field of taxation.

> The inherent power of a court to take whatever steps are required to fashion an effective desegregation decree compels the conclusion that the usual presumption of deference to a legislature in taxation matters does not mandate acceptance of the State Board's maximum rate. After Swann, it may not be disputed seriously that a court has authority to strike down impediments, financial or otherwise, to an appropriate remedy for the dismantling of a dual school system.[388] (emphasis added)

As precedent, Schwartz cited United States v. Missouri,[389] the school desegregation case in which District Court Judge James Meredith merged three suburban (St. Louis) school districts and set a tax rate higher than any of the three had previously had. While the Eighth Circuit Court of Appeals reduced that rate (to the highest one of the previously existing three rates), it noted that it was "satisfied that the district court had the authority to implement is desegregation order by directing that provision be made for the levying of taxes essential to the operation of the new school district."[390] Thus, Schwartz concluded that the case stood for the proposition that "a rate established pursuant to legislative command may be invalidated if inadequate to assure effective school desegregation."[391]

In a lengthy footnote, Schwartz offered two additional lessons to be learned from the Missouri case. First, the lower rate approved by the Eighth Circuit represented the highest rate already used by one of the three reorganized districts. Analogous to the Missouri case, Delaware's S.B. 457 was legislation not applicable throughout the state, but only in the desegregation area. Moreover, S.B. 457 represented a "clear departure from state law," since the EAA had provided for a consolidated district to levy a tax up to the highest rate of any component district.[392] Based on those and other factors, Schwartz stated the following:

> At this point, it suffices to say that the presumption of legislative regularity in matters of taxation that is usually accorded may be reduced when applied to newly enacted legislation significantly departing from prior State practice which legislation does not possess statewide applicability and which will self-destruct upon a particular judicial verdict in the case for which it was enacted.[393]

Second, in the Missouri case, the Eighth Circuit reduced the rate set by the district court based on the state's assurance that it would absorb the costs not covered by the lower rate. By contrast, in Evans, when Schwartz suggested "that one alternative would be to accept the rate set by the State Board. . . and assess an additional amount attributable to the desegregation process directly against the State. . . [t]he State Board regarded [that] approach as unsatisfactory."[394]

Next, Schwartz detailed the four bases on which he concluded that the state board's proposed tax rate would imperil the desegregation effort.

(1) Historic levels of support: Given that many districts had been spending extensively out of reserves, the proposed rate — even though higher than the existing tax rate in ten of the eleven districts — would provide less revenue than would have been spent by the eleven districts in the absence of desegregation.[396]

(2) Reorganization and desegregation expenses: An itemization of such expenses for which the new school district would be responsible led to this conclusion:

> To embark on the long overdue course of desegregation with funds which, if minimally sufficient to satisfy operating costs for one year, are inadequate to meet the actual costs of desegregation and reorganization is to invite disaster.[396]

(3) Inelasticity of the tax rate: The rate established by the state board's one-time calculation would be "forever binding" absent a referendum, the chances of which passing would be "exceedingly slim."[397]

> Thus, instead of a taxation scheme, the Legislature has provided merely a tax rate frozen in time without regard to rising costs or to the requirement that the (school district) gradually assume a greater share of desegregation costs.[398]

(4) Contrary state law: The state board based its figures on the assumption that students attending special schools would be funded by a tuition tax, as in the past. But under Delaware

law, that holds true only when there are multiple districts — that is, when the receiving district charges tuition of the sending district.[399]

Schwartz also noted in passing that since "the State Board's tax rate is completely controlled by its use of a vigorously contested enrollment figure. . . the validity. . . is highly questionable."[400] Elaborating, he pointed out that "the State has supplied different (enrollment) numbers at different times in a manner which suggests that the numbers are less supportive of the facts than they are of the State's litigation posture."[401] questioned a key premise underlying the state board's proposed rate — namely that teachers would continue their presently negotiated salaries.[402]

Finally, Schwartz briefly discussed the projections which the Planning Board made to arrive at its tax rate of $1.68, and concluded that that rate was "more responsive to the needs of the single district entering its first year of desegregation" than was the state board's rate "which would either have teachers working side by side at different rates of pay or would necessitate reductions in salaries or educational programs."[403]

> If [the lower rate is] accepted, the desegregation process will not only be imperiled but will be doomed to suffer a painful death from economic strangulation. The victims will be somewhere between 65,000 and 70,000 children.[404]

State is Ordered to Buy Buses. The tax ruling, and the legislative outrage it provoked, followed quickly on the heels of another confrontation over money between Schwartz and the

Dover lawmakers. After the General Assembly failed to appropriate funding for purchasing the 142 additional school buses needed under the desegregation plan, the Planning Board asked the court to order the appropriation.[405] Expressing apprehension that he would have to issue an order each time a bill to the state came due, Schwartz directed the state treasurer to write the necessary $2.4 million check. (The legislature had not yet appropriated funds for any desegregation-related costs, estimated at $10.3 million. However the state budget bill, introduced that same week in the General Assembly, did include a surplus of $10.4 million.)[406]

While the Wilmington Board continued to prevail in the Schwartz courtroom, elsewhere it was touched by revelations of scandal which some feared were "just the tip of the iceberg." Wendell Howell came under investigation by the white-collar crime unit of the state Department of Justice for use of Wilmington board funds and workers to furnish and renovate his home.[407] Though first insisting that he had done nothing wrong, Howell later resigned from his positions on the Wilmington and Planning boards (and as executive director of the Wilmington Housing Authority). A New Castle County grand jury subsequently indicted Howell on 13 charges — including six felonies — of illegal use of board funds (trial is pending).[408] In addition, the assistant superintendent of the Wilmington School District, a former Democratic state senator, was convicted on misdemeanor charges of using school funds to remodel his house and fired as a result.[409] (He had earlier been suspended for his knowledge of Howell's misuse of funds.)[410] And judging from the conclusion of state-hired auditors who reviewed the city board's books — that there was "blatant disregard for the accountability of the expenditure of public funds — more indictments might be forthcoming.[411]

State of Delaware v. Schwartz. The state board wasted little time in appealing Schwartz' tax ruling.[412] (Several weeks earlier, ten of the eleven defendant school boards had presented two hours of arguments before the Third Circuit, primarily on the question of how much busing was needed to overcome the illegal segregation in New Castle County.)[413] Simultaneously, Governor du Pont and the attorney general called in a New York constitutional law expert, Floyd Abrams, to consider whether the state should sue Schwartz personally to determine whether his taxing authority superceded the state's.[414] The suit against Schwartz was quickly filed.[415]

While waiting for its various appeals to be resolved, the state tried several ways to get around Schwartz' orders. The legislature approved a bill to forbid the state or county from enforcing the tax hike, thus putting the onus on federal authorities. In addition, the state board requested that Schwartz delay both his January 9 remedial decree, and his May 5 denial of a permanent injunction of the tax issue, pending completion of appellate review.[416]

During the hearing on the requested delay in collection of the Planning Board's higher tax rate, Schwartz proposed a compromise — that the state post a bond to cover the $2.5 million difference in the two tax rates until the appeal settled the final rate. But the Planning Board's attorney, Henry Herndon, argued that under that arrangement, the new district would be unable to reach a contract settlement with teachers. The state board's attorney also opposed the proposal but for the opposite reason: he feared the Planning Board would commit itself to expenses based on revenues which would have to be reduced if the state's appeal was successful. In the hearing, Schwartz also expressing annoyance that the Planning Board took no position on the state's request for a delay of the entire order. Herndon responded that the board members, while "deeply concerned with the ramifications" of a stay order, also occupied seats on existing boards and felt an obligation to their suburban constituents.[417]

Evans VIII: Delay of Remedial Order Denied

On June 13, 1978, Schwartz denied the state's request for a delay in his January 9 remedial order.[418] He contrasted the existing situation with events the previous August, when he had granted a similar request for a delay in the three-judge remedy order.

> As on August 5, 1977, the change from eleven districts to one still fairly can be characterized as "cataclysmic," [b]ut . . . its import is lessened. First, the Delaware

> Legislature has belatedly placed its imprimatur upon a four district reorganization with consequences far more severe than if the one district plan went into effect. Next, unlike the situation [in] 1977, tax bills have not yet been sent to county residents who are scheduled to receive tax bills with a single local school tax rate. Also, a new administrative structure for the single district has been developed and is functioning.[419]

He also noted the "public interest" in a "stable educational system."

> In carrying out its goal, the Planning Board has mailed individual pupil assignment notices to each parent of the over 60,000 children in the public school system, assigned all teachers by school and grade, designated fourteen schools for closing, revamped and achieved a common core curriculum, directed and accomplished a uniform reduction in the number of teachers, conducted orientation programs, ordered additional school busses, applied for federal funding, done preliminary budgeting, caused the election of an exclusive bargaining representative for the teachers and is currently engaged in difficult negotiations with the teachers' bargaining representative.[420]

Evans IX: Delay in Tax Collections Denied

Nine days later, on June 22, Schwartz denied the state's request for a delay in collection of the higher tax rate.[421] Several points in the opinion merit quoting. In reviewing the history of the tax issue, Schwartz noted that the court went so far as to set a maximum tax rate only because:

> (1) of the absolute necessity to adequately provide the desegregation effort with financial support; and (2) time was of the essence in assuring that the public had prompt notice of its tax obligations.[422]

On the question of the court's authority to supercede the legislature, the state claimed that Rodriquez and related principles of federalism rendered such judicial action "an infringement of the legislative process."[423] Schwartz dismissed the reliance on Rodriquez as off-point:

> Rodriquez involved a challenge to an existing statutory scheme of school financing. . . based in part on local property taxes. . . [But the parties in this case] are not litigating financial inequities but rather the final steps in the remedial phase of a desegregation order and it follows therefore that the Court's equitable power is the mainspring.[424]

However, he answered straight-on the essential charge that in the area of local taxation, a state legislature's expressed will is decisive:

> But if a state's taxing power is plenary under all circumstances, a demonstrably hostile state legislature could easily thwart a desegregation process. Although it is obviously appropriate for the Delaware Legislature to provide leadership, particularly in such extraordinary circumstances, and the Court repeatedly has implored the Legislature to do so, it does not follow that legislation ultimately passed is ipso facto binding upon the Court.[425]

He also set forth the dilemma a court faces in such a situation:

> When a federal court finds it necessary to override State authorities in a matter of local taxation, albeit with respect to application of a statute rather than to its facial validity, a tension is created between fundamental precepts. That tension is between principles of federalism impelling a federal court to defer to State legislature enactments and the judicial duty to enforce

equitable decrees vindicating the constitutional right to attend a racially nondiscriminatory unitary school system. In denying the State Board's request for permanent injunction on May 5, 1978, that tension was resolved in favor of the equitable power of a federal court to enforce its remedial decrees however unpopular or economically unattractive.[426]

Schwartz conceded that the federalism issue posed " a not insubstantial question of law."[427] However, he was less generous in evaluating the other criteria for granting a stay and, on balance, concluded that the delay was not warranted.[428]

Tax Bills are Mailed. With its appeal still pending in the Third Circuit, the state prepared to go ahead, at least temporarily, with the higher tax rate. New Castle County prepared the tax bills, but, after last minute pressure from Governor du Pont, changed the wording of the tax notice. As first worded, the notice took pains to blame the tax increase on the court, so that homeowners would not attribute it to county officials. Fearing that the judgmental language would further incite taxpayers, du Pont got the county executive to agree to a softer message.[429] But the words did little to soften the financial blow of the school tax bills to many suburban homeowners. The increase over the previous year's bill ranged from 17 percent in Newark to 89 percent in the Conrad district. (See chart below for the increase in other districts.) Even in Wilmington, where the new taxes levied were 36 percent less than in 1977, the city government added 76 cents to the municipal services tax, so that city homeowners got only a 5 percent net tax reduction.[430] (Since the school tax is only one component of the property tax, the percent increase in the latter tax was less severe. However, newspaper articles often failed to make that distinction, thus adding to homeowners confusion and anger at Schwartz.)[431]

Third Circuit Invalidates Tax Rate. No sooner had suburban residents gotten over the shock of their higher bills than the Third Circuit ruled that Schwartz had erred in rejecting the state's tax rate so swiftly.[432]

> True to the statement in its January 9, 1978, opinion. . . the district court approached the injunction hearing without extending the requisite deference to which legislative judgments in the field of taxation are entitled. . . [I]n so doing, the court overstated its power to fashion, and insure implementation of, an effective decree. For while it is true that the court specifically recognized that "deference. . . does not mandate acceptance," and while we agree that this particular formulation is a proper statement of the governing precept, we are convinced that the court failed to afford any deference to the legislative action. At best, the legislative solution was received as a neutral narrative fact; at worst, it was received with suspicion, subject to a condition that Delaware prove its regularity and constitutionality.[433]

To support its position, the appellate court opinion, written by Judge Aldisert, quoted several "Supreme Court teachings relating to the deference to legislative action where the issue of consitutionality is directly implicated," including Rodriquez.[434] The opinion also noted that in the Missouri case relied upon by

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Schwartz, the Eighth Circuit "did reverse the district court's imposition of a tax rate insofar as that rate exceeded one which was represented as adequate by state officials."[435] Concluding that "the State Board's ability to make a strong showing on the merits. . . was improperly skewed," the Third Circuit directed Schwartz to lower the tax rate to $1.585, at least temporarily, and hold a new hearing on the issue.[436]

Finally, the appeals court felt compelled to comment on the merits of Schwartz' tax ruling — though acknowledging that it was unnecessary to do so.

> Numerous times in its May 5 opinion, the court expressed concern that the State-approved budget did not reflect an increment to the normal operating budget sufficient to meet desegregation needs. Our observation is that this overlooks the critical, and incontrovertible, proposition that any money budgeted by the State to the Northern New Castle County school system must be used by (the Planning Board), first, to effect the desegregation order, and then to meet the expenses of other programs.[437]

As an example, the court suggested that school authorities might decide to curtail certain extracurricular programs unrelated to desegregation, so as to stay within its budget.

On All Else, Schwartz is Upheld. On every issue but taxation, the Third Circuit upheld Schwartz. First, it affirmed his rejection of the reverse volunteerism scheme as a satisfactory plan.[438] Second, it ruled that Schwartz did not fail to heed Dayton's instruction that a district court identify the exact amount of "incremental segregative effect."[439] More specifically, the appeals court (1) concluded that the plaintiffs had failed to meet their burden of showing that "the reach of the plan exceeded the grasp of the conditions created by constitutional violations;"[440] and (2) found Dayton "so factually distinct from the present litigation as to circumscribe detailed analogy."[441]

> Not the least of the differences between the two cases is that the system-wide remedy eventually disapproved in Dayton rested on three "relatively isolated" violations that could be deemed "of questionable validity." And finally, the unavoidable distinction is that prior to Brown I, in New Castle County, Delaware, desegregation was unlawful under Delaware law; in Dayton, Ohio, segregation was unlawful under Ohio law. This difference between the two states is, at base, the difference between the two cases.[442]

Third, the appeals court ruled that the district court could properly order ancillary relief, and that there existed adequate record to support each of the specific programs which Schwartz ordered. It had no sympathy for appellants' claim that Schwartz coopted an area better left to state and local officials.

> At no time did the State indicate that it would or could contrive the necessary ancillary programs. Simply put, we are hard pressed to see how state appellants can now invoke precepts of local autonomy when they failed to grasp their own opportunity to act in this regard. Under the circumstances, judicial authority was properly utilized.[443]

State Concedes, Almost. While the attorney general promised to appeal to the Supreme Court, his reaction to the Third Circuit's ruling was conciliatory:

> No further legal avenues are available to us to change the fact that desegregation will occur in September. The time has come for all of us, black and white, young and old, to put our differences behind us and to work together to ensure that desegregation as ordered by the court is not only implemented but implemented peacefully and in good faith.[444]

Several weeks later, the state made one last-ditch effort to have the Supreme Court stay the busing portion of the desegregation order until the high court had reviewed the state's appeal. The state did so after Justice Rehnquist temporarily stayed a desegregation order involving busing in Columbus, Ohio on August 12. (Since the Supreme Court was in recess until October, the stay request went before an individual justice.)[445] However, Justice Brennan, who is responsible for Delaware matters, considered the state's request and denied it.

Meanwhile, the state prepared for the all-but-inevitable on several fronts. Delaware officials secretly supervised the remodeling of a National Guard armory near the Wilmington airport for use as a holding center in the event of mass arrests provoked by school desegregation.[446] And the governor named prominent local residents to a new "effective Transition Commission" to oversee the desegregation process.[447]

New Castle County residents also seemed to be accepting the inevitability of desegregation at last. PAC, which once routinely attracted hundreds of people to its weekly meetings, hadn't held a public meeting in months. Observers offered a host of reasons--apathy, summer lull, or the resignation of PAC's founder, James Venema, to seek the Republican nomination for the U.S. Senate. But Jonathan Chace, who had monitored desegregation in Wilmington (and other cities) for the U.S. Justice Department's Community Relations Service, saw it as an acceptance by the community of the inevitable. Anti-busing fever cools down, Chase said, "only when there's a sense that the legal aspects of the case are worked through, when there's little expectancy of a reversal. This is reinforced in lots of other ways, when local officials begin to say not whether or not but how (desegregation will occur)." 448

Board Agrees to Live with Lower Tax Rate. The Planning Board too had a conciliatory reaction to the Third Circuit ruling; the board decided to "learn to live with" the lower tax rate for a year rather than ask Schwartz to hold hearings on the matter again. The lower rate meant the board would have $2.4 million less to work with. Since most of that money had been expected to go for teachers' salaries, it was the union that protested the board's decision. The New Castle County Education Association, a NEA affiliate, which won the right to represent the new district's teachers, had promised to settle for nothing short of immediate leveling-up (see Table 4); association president Michael Epler said the board was "making a big mistake." 449

Meanwhile, contract talks between teachers and school district officials continued without progress. Roving bands of teachers picketed to protest the board's failure to make a firm proposal on salaries for the coming school year.450 The start of school arrived with no agreement in sight, and teachers returned to the classroom, still without a contract.

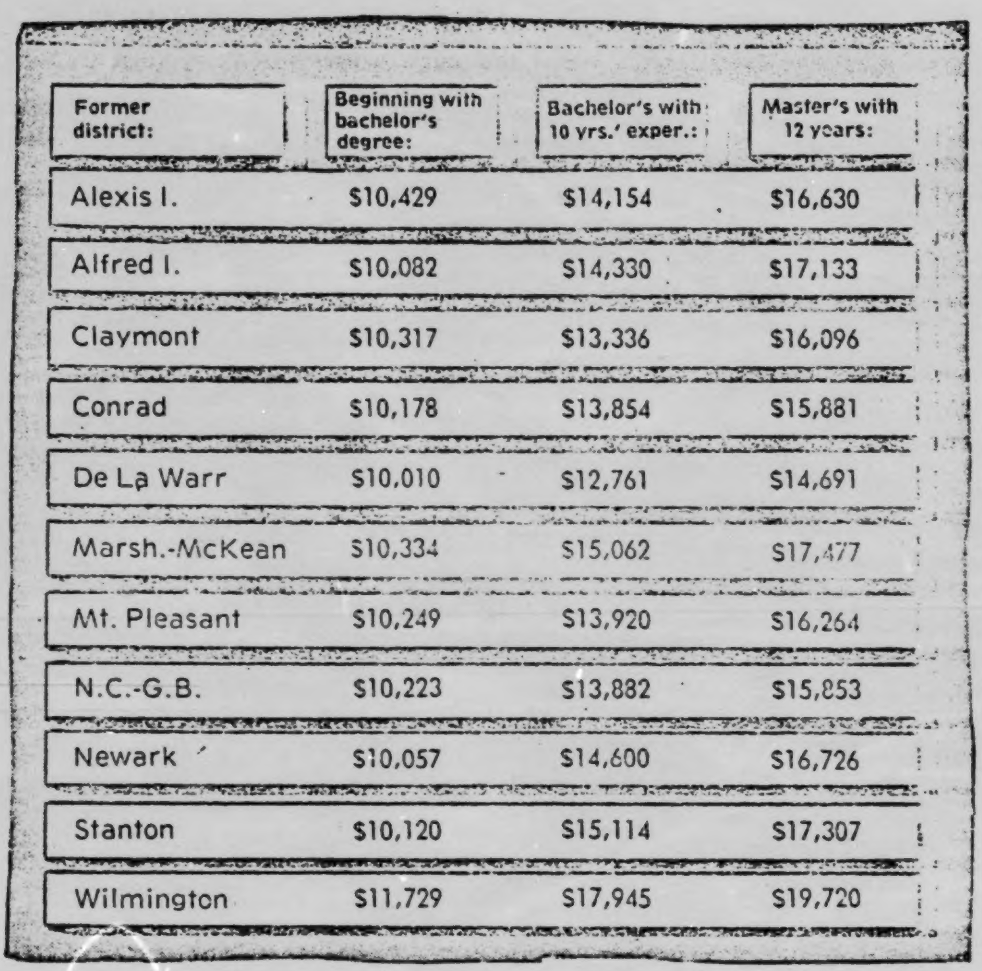
Buses Roll Smoothly, Police "Happily Bored". On Monday, September 11, twenty years after the suit was filed, the buses finally rolled. Nearly 47,000 students—21,500 as a result of the court order—were transported to 93 schools throughout the 350 square mile area of New Castle County. More than two hundred members of the press were there (less than half of what school officials were prepared for) to cover the opening of school; national news programs gave it brief coverage, but the start of busing in Los Angeles overshadowed events in Wilmington.[451]

Except for minor logistical problems, and a few scuffles that had racial overtones, the first week of school went smoothly. Dozens of police on hand for possible trouble sat idly by, and the state police superintendent described his group as "very happily bored."[452] Attendance hovered around a healthy 90 percent, and contract talks with teachers resumed after a ten-day delay.

Scabs Leave Scars. After working nearly a month without a contract, teachers met on October 5 and authorized the association to call a strike on Monday, October 16 unless tentative agreement was reached.[453] Although the strike contemplated was (and is) illegal under state law, Delaware teachers had resorted to such lengths before. (In fact, the high salaries enjoyed by former Wilmington teachers were due in part to a twenty-eight day strike their union, an AFL-CIO affiliate, had staged in 1975. Some feel that the city teachers, anticipating desegregation, were after generous contracts to take with them to the suburbs.) School district officials took a very restrained stance toward

TABLE 4

NEW CASTLE COUNTY TEACHERS' SALARIES



Former district:	Beginning with bachelor's degree:	Bachelor's with 10 yrs.' exper.:	Master's with 12 years:
Alexis I.	$10,429	$14,154	$16,630
Alfred I.	$10,082	$14,330	$17,133
Claymont	$10,317	$13,336	$16,096
Conrad	$10,178	$13,854	$15,881
De La Warr	$10,010	$12,761	$14,691
Marsh.-McKean	$10,334	$15,062	$17,477
Mt. Pleasant	$10,249	$13,920	$16,264
N.C.-G.B.	$10,223	$13,882	$15,853
Newark	$10,057	$14,600	$16,726
Stanton	$10,120	$15,114	$17,307
Wilmington	$11,729	$17,945	$19,720

Source: Wilmington News Journal, November 12, 1979 the strike threat. They avoided using the word "illegal" to describe the strike, announced that they would not seek a temporary restraining order to halt it, and refrained from contacting substitute teachers. Superintendent Biggs actually encouraged coaches to coach even if they honored the strike.[455]

On October 16, with no contract in sight, 80 percent of the 3,900 teachers stayed out. More than half of the nearly one hundred schools were shut down, and those that remained open were able to do so only because so few students showed up. With nothing to gain from leveling up, the 900-member Federation--representing most former city teachers, two-thirds of them black--voted not to honor the strike. While there was little heckling of teachers who crossed the picket lines to work, many feared that the old adage "Scabs Leave Scars" would prove true in an especially unfortunate--because racially-related--way.[456]

The strike lasted five weeks. Midway through the first week, the board abandoned its passive strategy and requested a temporary restraining order in chancery court. Chancellor William Marvel issued a back-to-work order, but refused to prohibit teachers from picketing for fear of abridging their right of speech.[457] Striking teachers ignored the order.

In the second week, teachers voted down the board's latest offer--worth an additional $2 million--to level-up by the middle of the 1980-81 school year.[458] Chancellor Marvel issued a preliminary injunction and fined the union $30,000, plus $5,000 for each day they continued to strike.[459] Still they refused to budge.

Schwartz is Asked to Intervene. In the fourth week, a parents' group asked Judge Schwartz to intervene in the strike, and a hearing was set for November 15.[460] Superintendent Biggs and Association president Epler asked for a special session of the legislature; the two wanted the state to release the funds it had saved from not having to pay striking teachers — more than $180,000 per day — to beef up the board's settlement package.[461]

A Wilmington News-Journal editorial called for Schwartz to step in.

> We are aware that the courts have been reluctant to intervene in the management aspects of the school district, and in its labor-management relations. . . [But] the federal court's legitimate interest in the school situation lies in the implementation of its constitutional mandate to operate desegregated schools.[462]

But both the new school board and the Wilmington plaintifffs in the case opposed the idea.(Schwartz later declined to intervene.)

In the fifth week, the board announced a four-point program to "get our school system moving again" — firing teachers who continued to strike, paying those who didn't at the rate currently being offered at the bargaining table, calling in substitute teachers to expand the minimal educational programs being offered during the strike, and encouraging parent volunteers to help staff the classrooms.[463] About 200 striking teachers returned to work, but 70 percent of them remained out.[464] Strikers marked the first day of American

Education week by marching through Wilmington — 2000 strong — while an 18-piece band played a new version of the song "Hey, Bigg Spender," (the Wilmington media had recently reported that Superintendent Biggs was receiving $10,000 in deferred compensation, in addition to his $56,000-plus salary, making him the first or second highest-paid public employee in the state[465]). One marcher carried a sign that read, "Is Scarborough Fair?" — referring to school board president Gilbert Scarborough, who maintained that the district could not level-up "because we have no more money."[466]

Settlement at Last. In mid-November, the board made another contract offer which called for leveling-up by the middle of the following year. The package — worth about $1.7 million more than the board's previous offer — hinged on the savings to the board (approximately $80,000 a day) from not having to pay 3000 teachers during the strike. Governor du Pont also agreed to allow the $4 million the state had saved during the strike to be "reused" to sweeten the pot. The teachers voted overwhelmingly to accept the offer, and union and school officials agreed to keep the schools closed the entire week of Thanksgiving so that tempers could cool.[467] On Monday, Noverber 27, despite the first snowstorm of the season, the schools finally reopened. (One principal observed that many students would ordinarily have stayed home in such bad weather. But, he said, "parents were so anxious to get their children back in school I think they would have brought them in by dog sled.")[468]

Business as Usual. No sooner had the school resumed than the state board adopted a proposal to divide the newly organized district into four autonomous districts. The proposed districts would follow the boundary lines of the existing attendance areas, and would not change the present countywide busing scheme. The countywide tax rate would also remain the same, unless changed by local district referendum. The state board's plan cited three reasons for adopting a four-district school system:

> the need for locally governed school districts; desegregation of the student body; and a July 24 opinion of the 3rd U.S. Circuit Court of Appeals which urged the state "to come forward with meaningful solutions" to desegregate suburban Wilmington and city schools.[469]

The Wilmington newspaper called the proposal "ill timed and ill advised."[470] Howell's replacement on the board, James Sills, said it was "politically and racially inspired."[471] And board president Scarborough said it was too soon to talk about creating four new school districts, since "[t]he baby (the county school district) hasn't had a chance to walk yet."[472]

Meanwhile, in an attempt to provide more generously for "the baby," the board asked Judge Schwartz to restore the tax ceiling of $1.68 set the previous winter (Evans V). Attorneys for both plaintiffs and defendants opposed a lifting of the legislation. During the day-long hearing, Schwartz was troubled by the effect of the recent teachers' contract settlement on the school district's budget. "If the (estimated) deficit for next year was caused by the settlement, should the court consider that?" Schwartz asked.[473]

Update--March, 1979.[474] The state board's proposal for a four-district plan has been shelved for the time being. During the winter, the state board held public hearings on its plan. Citizen reaction was generally negative; parents had tired of the change and uncertainty and wanted to avoid further disrupting the schools. New Castle County legislators also saw the political wisdom of staying with the single-district arrangement. This way, they can blame Judge Schwartz for whatever problems desegregation creates; by redistricting, they would be shifting responsibility to themselves. (Downstate legislators favor redistricting; like the state board, they fear the power of a single district that contains over half of all the students in the state.)

Near the end of February, Schwartz denied the New Castle County board's request that he restore the $1.68 tax ceiling. The board has yet to decide whether it will ask for reargument on the request.

Meanwhile, the New Castle County schools are operating with only minor problems, considering. The logistics of busing 47,000 children are not yet altogether smooth. Some parents perceive that discipline is deteriorating--a perception that is probably accurate in some schools, inaccurate in others. And some administrators fear that enrollment will drop ten to twelve percent as of the 1979-80 school year, though it is questionable that private schools in the area could handle more than a few percent of the potential transfers.

The board continues to submit reports to Judge Schwartz--though the schedule is down from biweekly to monthly. And whereas Schwartz used to contact the district every other week or so with some request or query, he now keeps a low profile in the case. The school board has replaced Schwartz as the visible target for angry parents, though the governor and legislators get their share of calls also.

As the 25th anniversary of Brown approaches, so too does the end of the first year of what many vowed would never come about--the desegregation of Wilmington and New Castle County, Delaware.

APPENDIX A

MEMBERS OF INTERIM BOARD OF EDUCATION

School District	Board Member(s)	(Employer) Occupation	Race
Alexis I. DuPont	Bruce Kirk	Engineer (DuPont)	White
Alfred I. DuPont	Gilbert Scarborough, Jr.	Businessman (Owns Insurance Co.)	White
Claymont	James Elder	Mail Clerk	White
Conrad	Clifford M. Steele	Engineering Designer (DuPont)	White
De La Warr	Alberta Torrence	--	Black
	David Green	Accountant (?)	White
Marshallton-McKean	*Mary DiVirgilio	--	White
Mt. Pleasant	Aaron Hamburger	Marketing Specialist (DuPont)	White
Newark	Priscilla Crowder	--	White
	William Clark	Chemist (Hercules)	White
New Castle Gunning Bedford	George Rosentreter	Sales Rep. and District Manager (Oxford Chemicals)	White
Stanton	Joseph Reardon	Chemist (DuPont)	White
Wilmington	William Lewis	Personnel Specialist (Retired, DuPont)	Black
	*Benjamin Amos	Director, Wilm. Housing Authority	Black
	Wendell Howell	Counselor (Del. Tech. & Comm. College)	Black

*Appointed after resignation.

Source: Raffel, Desegregation Dilemmas.

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APPENDIX B

STATISTICS

AREA

New Castle County	New Castle County School District
435 square miles	330 square miles

City of Wilmington

(included in above figures)
15 square miles

- -

POPULATION
1977

Delaware - 582,000

Wilmington - 80,000
Suburban NCC - 327,000
Total NCC - 407,000

1950

Wilmington	110,000
Suburban NCC	62,000
Total	172,000

1975

		%Black
Wilmington	76,654	55.5%
Suburban NCC	316,994	3.9%
Total	393,648	13.9%

- -

DELAWARE SCHOOL DISTRICTS

1919 - 450 (of which approximately 300 had one teacher)
Mid-60's - 49 Districts
1968 - 26 Districts (including 3 County-wide vo-tech districts)
1978 - 16 Districts (" " " " " " ")

- -

NEW CASTLE COUNTY SCHOOL DISTRICT

Students - *65,000
Schools - 99
Employees - *7,000 - Plus *4,000 part-time
Schools included - All public schools in New Castle County except those in the Appoquinimink and the NCC Vocational-Technical Districts
Budget 1978-79 - *$155,000,000

* Approximately

Source: SANE of Delaware, Inc., 1978 Fact Book: New Castle County School System and History of Evans v. Buchanan, August, 1978.

APPENDIX C

DESEGREGATION CHRONOLOGY

1868	14th AMENDMENT TO CONSTITUTION -- "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . without due process of law nor deny any person within its jurisdiction the equal protection of the laws."
1896	PLESSY v. FERGUSON -- United States Supreme Court states "separate but equal" satisfies the Constitutional requirements of the equal protection clause. This case involved a man who was 7/8 white and 1/8 black, who had been excluded from an all-white dining car on a Louisiana train.
1897	ARTICLE X, DELAWARE CONSTITUTION -- Institutes segregated public school system in Delaware.
1952	BELTON v. GEBHART and BULAH v. GEBHART -- Chancellor Collins Seitz rules that the existing educational facilities for the black and white students are not equivalent and orders immediate admission of black children to Claymont and Hockessin schools. These cases were later incorporated in the Brown decisions.
1954	BROWN v. BOARD OF EDUCATION OF TOPEKA (Kansas) -- Brown I -- The United States Supreme Court declares the "separate but equal" principle unconstitutional and orders schools desegregated.
1955	-- Brown II -- The Court affirms Brown I and orders that schools be desegregated with all deliberate speed.
1956	EVANS v. BUCHANAN initially filed in District Court by residents of Clayton, Delaware. Court enjoined the district to admit black students. In a continuation of the suit filed in 1957, 7 cases were consolidated for trial. In 1961, District Court Judge Caleb Wright issued the order approving, with modification, the plan presented by the State Board of Education.
1964	CIVIL RIGHTS ACT -- Congress passed law aimed at ending discrimination against minority groups. It provides measures for ensuring equal rights for all Americans to vote, work, use public accommodations and facilities, public education and programs receiving federal funds.
1965	DELAWARE STATE BOARD OF EDUCATION -- Board adopts resolution to end "de jure" (mandated by law) segregation. By 1967 last black school district is phased out.
1968	EDUCATIONAL ADVANCEMENT ACT -- Delaware State Legislature establishes framework for reorganization of Delaware schools. Wilmington School District is excluded from parts of this Act.
1968	GREEN v. BOARD OF EDUCATION OF KENT COUNTY (Virginia) -- Supreme Court unanimously decides that "freedom of choice" is not adequate in this case.
1971	EVANS v. BUCHANAN reopened by 5 black parents from Wilmington. Plaintiffs contend that Wilmington schools have not been desegregated and that the Educational Advancement Act violated their Constitutional rights under the 14th Amendment.
1971	SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION (North Carolina) -- Supreme Court adopts "tools" for achieving desegregation. Mandatory busing authorized among other means.

Source: SANE of Delaware, Inc., 1978 Fact Book.

1973	KEYES v. SCHOOL DISTRICT #1 (Denver, Colorado) -- First case in which Supreme Court orders a remedy for "de facto" segregation. -- A new interpretation of "dual" segregation is set forth which states that where intentional segregation has been proven in a "substantial" part of a school district, a legal presumption is created that the whole district is a "dual" school system. -- The first Northern city ordered desegregated by the Supreme Court.
1974 July 12	EVANS v. BUCHANAN -- District Court concludes that a unitary school system has not been established and requires Defendant State Board of Education to submit "alternate desegregation plans (a) within the present boundaries of the Wilmington School District, and (b) incorporating other areas of New Castle County. The plaintiffs may also submit alternative desegregation plans."
1974 July 25	MILLIKEN v. BRADLEY (Detroit, Michigan) -- Supreme Court concludes "it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation" in order for an inter-district remedy to be imposed.
1975 Mar.27	EVANS v. BUCHANAN -- District Court affirms its 1974 ruling and declares part of the Educational Advancement Act unconstitutional. It again orders that remedies be submitted in accordance with the initial ruling.
1975 Apr.16	EVANS v. BUCHANAN -- The order is rendered by District Court, based on its 1974 and 1975 rulings. The order again requires the parties to submit both inter-district and "Wilmington only" plans and enjoins the State Board of Education, in preparing its inter-district plans, from relying upon those provisions of the Educational Advancement Act which had been found to be unconstitutional.
1975 Nov.17	BUCHANAN v. EVANS -- Supreme Court summarily affirms the District Court ruling, stating: "The judgment is affirmed."
1976 Jan.19	BUCHANAN v. EVANS -- Supreme Court denies a State Board of Education petition for a new hearing.
1976 May 19	EVANS v. BUCHANAN -- District Court renders opinion, reiterating its finding of an inter-district violation and thus includes 10 suburban districts in the remedy. Opinion states that the Court will consider any school whose enrollments in each grade range between 10 and 35% black to be prima facie desegregated. A two-step phase-in is established, beginning with the secondary schools in September 1977 and the elementary schools in September 1978.
1976 June 7	WASHINGTON v. DAVIS (District of Columbia) -- Supreme Court rules that plaintiffs in civil rights cases must prove a "racially discriminatory purpose" on the part of the officials and may not rest their case merely on disproportionate racial impact.
1976 June 15	EVANS v. BUCHANAN -- District Court orders desegregation and reorganization of 11 school districts in New Castle County in compliance with the May 19 opinion.
1976 Nov. 29	BUCHANAN v. EVANS -- Supreme Court refuses to hear appeal, stating: "The appeals are dismissed for want of jurisdiction."

1976 Dec. 6	AUSTIN INDEPENDENT SCHOOL DISTRICT v. UNITED STATES (Texas) -- Supreme Court vacates the desegregation order of the Fifth Circuit Court and sent the case back to the lower court for further review in light of Washington v. Davis.
1976 Dec. 28	EVANS v. BUCHANAN -- District Court refuses a request for a stay of the order.
1977 Jan. 11	VILLAGE OF ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEVELOPMENT CORP. (Illinois) -- Supreme Court rules that communities do not have to make allowances for integration unless there is proof of purposeful racial discrimination.
1977 Jan. 25	UNITED STATES v. BOARD OF SCHOOL COMMISSIONERS OF CITY OF INDIANAPOLIS -- Supreme Court strikes down a Federal Court's inter-district plan and orders Seventh Circuit Court to reconsider in light of Arlington Heights and Washington v. Davis.
1977 May 5	EVANS v. BUCHANAN -- District Court again refuses a request for a stay of the order.
1977 May 18	EVANS v. BUCHANAN -- Third Circuit Court of Appeals affirms District Court Judgment of June 15, 1976, with modifications.
1977 May 19	EVANS v. BUCHANAN -- Third Circuit Court of Appeals dismisses a previous request for a stay of the District Court order, stating that the delay request was made moot by their May 18 ruling.
1977 Jun. 27	DETROIT -- Supreme Court upheld lower court plan for school desegregation in Detroit and issued judgment requiring Michigan to pay part of the cost of the remedial programs called for in the plan.
1977 Jun. 27	DAYTON -- Supreme Court found the plan too broad in light of the scope of the constitutional violations cited and ordered lower court to seek additional evidence concerning "intent." Also ordered district to continue current plan while lower court works out more limited plan.
1977 Jun. 29	MILWAUKEE and OMAHA -- Supreme Court nullified rulings that these school systems intentionally maintained racial segregation and sent the cases back to lower courts for reconsideration.
1977 Aug. 5	EVANS v. BUCHANAN -- District Court Judge Murray M. Schwartz issued an Opinion and Order denying the State Board plan for "one-way" busing, staying implementation of school desegregation until the Supreme Court rules on a writ of certiorari, ordering appointment of a New Board of five members which shall file a plan for a unitary desegregated school system with the Court by September 30, 1977, and which shall report its progress to the Court every two weeks, beginning August 19, 1977.
1977 Oct. 3	BUCHANAN v. EVANS -- Supreme Court denied petition for writ of certiorari.
1977 Nov. 7	BUCHANAN v. EVANS -- Supreme Court denied petition for rehearing of its denial of writ of certiorari of October 3, 1977.
1977 Nov. 8	EVANS v. BUCHANAN -- Judge Schwartz stayed implementation until September, 1978.

1977 Dec. 12	LANSING, MICHIGAN -- Supreme Court, without comment, refused to hear an appeal concerning desegregation of schools, thereby letting stand the lower court's desegregation order which resulted in the busing of 2,400 elementary pupils in grades 1-6.
1978 Jan. 9	EVANS v. BUCHANAN -- Judge Schwartz issued Order utilizing a "9-3" plan. The maximum tax rate was set at $2.23 / $100 of assessed valuation ($1.91 current operating expense, $.24 debt service, $.05 Tuition Charges, and $.03 Minor Capital Expenses). Ancillary relief programs were ordered as was inclusion of assignment of Hispanic population so as to continue the Bilingual program.
1978 Jan. 20	EVANS v. BUCHANAN -- Judge Schwartz issued Opinion and Order modifying January 9 decision in that it clarified the State funding requirement of the January 9 ruling.
1978 Feb. 27	LOUISVILLE, KENTUCKY -- Supreme Court, without comment, denied an appeal by Kentucky Governor Julian Carroll seeking permission to ask for federal help in paying for busing in the Louisville area. The effect of this decision was to leave in place a lower court ruling which prevented the State of Kentucky from denying bus operation and purchasing funds for Louisville, Jefferson County schools.
1978 Apr. 28	EVANS v. BUCHANAN -- Judge Schwartz issued Order requiring State Board of Education to execute purchase orders by May 1 for 142 school buses.
1978 May 5	EVANS v. BUCHANAN -- Judge Schwartz entered Order denying State Board of Education's motion for injunction of tax rate for current operating expenses in excess of $1.585.
1978 June 28	BAKKE CASE -- Supreme Court upheld the principal of affirmative action to overcome past discrimination but at the same time held invalid the University of California, at Davis, medical school's particular plan which utilized quotas.
1978 Jul. 24	EVANS v. BUCHANAN -- Third Circuit Court of Appeals issued Judgment affirming District Court's rulings of August 7, 1977, and January 9 and 20, 1978 in entirety except that Judge Schwartz was ordered to hold hearings on the tax issue.
1978 Jul. 26	EVANS v. BUCHANAN -- Judge Schwartz vacated the District Court's Order of May 5 and ordered the New Castle County Board of Education to set the tax rate for current operating expenses at $1.585 until further Order of the Court. (This amounts to a total school tax rate of $1.875.)
1978 Aug. 11	COLUMBUS, OHIO -- Supreme Court Justice William Rehnquist temporarily stayed the desegregation order of the lower courts which was to be implemented September 7, 1978. Justice Rehnquist found the remedy to exceed the violation. Approximately 37,000 of the district's 89,000 students were to be bused. The NAACP petitioned the Supreme Court to set aside Justice Rehnquist's stay; the petition was denied.

CITATIONS FOR VERBATIM QUOTES

A. Carol E. Hoffecker. Delaware: A Bicentennial History. W. W. Norton & Co., Inc. (1977).

B. Du Pont Company, Wilmington (1968).

C. Michael Barone, Grant Ujifusa, and Douglas Matthews. The Almanac of American Politics 1976. New York: E.P. Dutton & Co., Inc. (1975).

D. Jeffrey A. Raffel, Desegregation Dilemmas: The Politics of Preparing for Court-Ordered Metropolitan, Inter-District School Desegregation (Draft). College of Urban Affairs and Public Policy, University of Delaware, Newark, Delaware (December 1977). (Raffel's quotes all taken from Richard Kluger, Simple Justice. New York: Alfred A. Knopf, Inc. (1975).

E. 447 F. Supp. 982 (D.Del. 1978).

FOOTNOTES

Explanation of Footnotes

1.) The Wilmington News Journal Company publishes two daily papers--the *Morning News* and the *Evening Journal*--as well as the *Sunday News Journal*. In most cases, the footnotes cite the specific paper (e.g., *Morning News*) by name. However, in a few cases, the author was unable to determine whether the information cited was published in the morning or evening paper (or both); there, the cite is to "Wilmington News Journal."

In a few cases, the author was unable to determine the exact date of a newspaper article. There, the footnote indicates the approximate date of the article, as well as the accompanying headline (and byline, if one appeared).

2.) Where all of the information in a paragraph is from a single source, the footnote to that source appears at the end of the paragraph. Similarly, a footnote in the middle of a paragraph refers to all of the preceding information in that paragraph. When multiple quotations of a single individual, taken from the same source, appear in a single paragraph, they are cited at the end of the final quote.

1. Du Pont Company, Wilmington (1968).
2. Jeffrey A. Raffel, Desegregation Dilemmas: The Politics of Preparing for Court-Ordered Metropolitan, Inter-District School Desegregation (Draft). College of Urban Affairs and Public Policy, University of Delaware, Newark, Delaware (December 1977). (Raffel's quotes all taken from Richard Kluger, Simple Justice. New York: Alfred A. Knopf, Inc. (1975) at I, 13.
3. Id.
4. Du Pont Company, Wilmington (1968).
5. Carol E. Hoffecker, Delaware: A Bicentennial History. W. W. Norton & Co., Inc. (1977) at 60.
6. Raffel at I, 13.
7. Hoffecker at 60.
8. Raffel at I, 7.
9. Id.
10. Id.
11. 393 F. Supp. 428 (D.Del. 1975), 432.
12. Raffel at I, 3.
13. SANE of Delaware, Inc., 1978 Fact Book: New Castle County School System and History of Evans v. Buchanan (August, 1978) at 2.
14. Morning News, Feb. 6, 1978.
15. Raffel at III, 6.
16. Raffel at III, 2.
17. Id. at III, 10.
18. Id. at III, 16.
19. Id. at II, 7.
20. Sunday News Journal, Nov. 20, 1977.
21. Raffel at II, 8.
22. Id.
23. Wilmington News Journal, Feb. 4, 1975.
24. Id.
25. 152 F.Supp. 886 (D.Del. 1957).
26. Jurisdictional Statement, prepared by Attorneys for Newark School District, Appellant, (Evans, et al., Appellees) in the Supreme Court of the U.S., October Term, 1976 at 5-6.

27. Id.
28. 256 F.2d 688 (3rd Cir. 1958).
29. 172 F.Supp. 508; 173 F.Supp. 891 (D.Del. 1959).
30. Evans v. Ennis, 281 F.2d 385 (3rd Cir. 1960).
31. 195 F.Supp. 321 (D.Del. 1961).
32. Jurisdictional Statement, at 7-8.
33. Evening Journal, Feb. 5, 1975.
34. Evening Journal, Feb. 5, 1975; Jurisdictional statement, at 8.
35. 393 F.Supp. at 438-9.
36. Jurisdictional statement at 10.
37. Evening Journal, Feb. 5, 1975.
38. 393 F.Supp. at 439.
39. 207 F.Supp. 820 (D.Del. 1962).
40. 379 F.Supp. 1218 (D.Del. 1974), 1219-20.
41. Julie Schmidt, telephone interview, September, 1978.
42. John Sinclair, Attorney for Newark School District, personal interview, July 21, 1979.
43. Evening Journal, August 13, 1973.
44. Id., Sept. 18, 1973.
45. Id., Oct. 29, 1973.
46. 379 F.Supp. at 1220.
47. Wilmington News Journal, Dec. 22, 1973; Jan. 12, 1974; Jan. 14, 1974.
48. Wilmington News Journal, Dec. 14, 1973.
49. Id.
50. Evening Journal, Dec. 19, 1973.
51. Wilmington News Journal, Dec. 14, 1973.
52. Wilmington News Journal, Jan. 8, 1974.
53. Morning News, Jan. 30, 1974.
53a. 379 F.Supp. 1218 (1974).
54. 379 F.Supp. at 1221.
55. Id. at 1221-22.
56. Id. at 1225 (Gibbons, Cir. J., concurring in part and dissenting in part).
57. Id. at 1222.

58. Id.
59. Id. at 1223.
60. Id. at 1224-1233.
61. Id. at 1228.
62. Id. at 1233.
63. 418 U.S. 717 (1974).
64. Sinclair interview.
64a. 393 F.Supp. 428.
65. Id. at 437.
66. Id. at 447.
67. Id. at 433.
68. Id. at 438.
69. Id. at 442.
70. Id. at 439.
71. Id. at 441.
72. Id. at 443.
73. Id. at 444.
74. Id. at 445.
75. Id. at 446.
76. Id. at 446-47.
77. Id. at 449 (Layton, Sr. Dist. J., dissenting).
78. Id. at 453.
79. Morning News, April 3, 1975.
80. Id.
81. Id.
82. Wilmington News Journal, March 31, April 3, 1975 ("State, Districts Focus on Integration, Appeal").
83. Evening Journal, April 25, 1975.
84. Id.
85. Wilmington News Journal, June 12, 1975.
86. Wilmington News Journal, July 28-31, 1975 ("3rd State Effort: Desegregation on a Voluntary Basis," by Larry Nagengast).
87. Evening Journal, Oct. 10, 1975.

88. Wilmington News Journal, Oct. 21, 1975.
89. Evening Journal, Oct. 24, 1975.
90. Wilmington News Journal, Oct. 21. 1975.
91. Evening Journal, Oct. 23, 1975.
92. Id.
93. Id.
94. Id., Nov. 14, 1975.
95. Id. (Also, see Wilmington News Journal, Nov. 11 and 12, 1975).
96. Raffel at VI, 40.
97. Richard Allen, Attorney for Mt. Pleasant School District, personal interview, July 19, 1978.
98. Evening Journal, Dec. 14, 1975.
99. Id., Dec. 18, 1975.
100. Id., Dec. 17, 1975.
101. Id., Dec. 20, 1975.
102. Evening Journal, Dec. 14, 1975.
103. Id., Dec. 18, 1975.
104. 555 F.2d 373 (3rd Cir. 1977), 386.
105. Wilmington News Journal, May 15, 1975.
106. 423 U.S. 963 (1975) (per curiam).
107. Id. at 975 (Rehnquist, J., joined by Burger and Powell, Js., dissenting).
108. Evening Journal, Dec. 3, 1975.
109. Id. at 341.
110. Id. at 339.
111. Id. at 343.
111a. Id. at 336.
112. Id. at 346.
113. Id. at 347.
114. Id.
115. Id.
116. Id. at 347-348.
117. Id. at 347.
118. Id. at 348.
119. Id.
120. Id. at 350.

121. *Id*.
122. *Id*. at 351.
123. *Id*. at 350.
124. *Id*. at 351.
125. Id. at 357.
126. *Id*. at 351-52.
127. *Id*. at 352.
128. *Id*. at 353.
129. *Id*.
130. *Id*. at 355.
131. Id.
132. *Id*. at 356.
133. *Id*.
134. *Id*.
135. *Id*. at 357-58.
136. *Id*. at 357.
137. *Id*. at 359.
138. *Id*.
139. *Id*. at 361.
140. *Id*. at 360.
141. *Id*. at 361.
142. *Id*. at 360.
143. *Id*. at 364.
144. *Id*.
145. *Id*. at 364-65.
146. *Id*. at 365.
147. *Id*. at 368 (Layton, J., concurring in part and dissenting in part).
148. *Id*. at 370.
149. *Morning News*, June 16, 1976.
150. *Id*.
151. *Id*.
152. Wilmington News Journal, June 18, 1976.
153. *Id*., July 7, 1976.
154. *Id*., June 17, 1976.
155. *Id*.
156. *Id*., July 7, 1976.
157. *Id*., July 5, 1976.

158. Id., July 28, 1976.
159. Id.
160. Philadelphia Inquirer, Dec. 5, 1976.
161. Evening Journal, Oct. 29, 1976.
162. Philadelphia Inquirer, Dec. 5, 1976.
163. Morning News, Sept. 22, 1976.
164. Wilmington News Journal, Oct. , 1976 ("U.S. Decries City School Merger Plan" by Larry Nagengast).
165. Id.
166. Evening Journal, Nov. 2, 1976.
167. Evening Journal, Nov. 29, 1976.
168. 555 F.2d. at 386, n.15. (Garth, Cir. J., dissenting, joined by Rosenn and James Hunter, III, Cir. Js.).
169. Morning News, Dec. 15, 1976.
170. Wilmington News Journal, Dec. 10, 1976.
171. Sunday News Journal, Nov. 20, 1977.
172. Aumiller v. University of Delaware, 434 F.Supp. 1273 (D.Del. 1977).
173. Id.
174. Anderson v. Redman, 429 F.Supp. 1105 (D.Del. 1977).
175. Morning News, Dec. 15, 1976.
176. 424 F.Supp.875 (D.Del. 1976), 880.
177. Wilmington News Journal, Jan. 11, 1977.
178. Evening Journal, Jan. 12, 1977 (editorial).
179. Evening Journal, Jan. 19, 1977.
180. Id.
181. Evening Journal, Jan. 14, 1977.
182. Id. Jan. 28, 1977.
183. Wilmington News Journal, Feb. 11, 1977.
184. Evening Journal, Feb. 15, 1977.
185. Morning News, March 3, 1977 (article, page 1-2).
186. Id. (article, page 2).
187. Evening Journal, March 11, 1977.
188. Morning News, March 17, 1977.
189. Id.
190. Id.
191. Wilmington News Journal, April 1, 1977.

192. See Raffel at VI, 18-35.
193. Id. at VI, 23.
194. Id. at VI, 24.
195. Id.
196. Evening Journal, April 29, 1977.
197. Morning News, May 6, 1977.
198. Id.
199. 555 F.2d 373.
200. Id. at 377.
201. Id. at 378.
202. Id. at 379.
203. Id. at 380.
204. Id. at 380-81.
205. (Garth, Cir. J., dissenting, joined by Rosenn and James Hunter, III, Cir. Js.)
206. Morning News, May 19, 1977.
207. Id., May 20, 1977.
208. Id., May 19, 1977.
209. Id., May 20, 1977.
210. Id.
211. Evening Journal, May 19, 1977.
212. Morning News, May 25, 1977.
213. Id., May 27, 1977.
214. Wilmington News Journal, May 28, 1977.
215. Id.
216. Evening Journal, June 17, 1977.
217. Id.
218. Id., June 23, 1977.
219. Id.
220. Wilmington News Journal, June 25, 1977.
221. Morning News, June 29, 1977.
222. Evening Journal, July 7, 1977.
224. 435 F.Supp. 832 (D.Del. 1977), 838.
225. Id. at 837.
226. Evening Journal, July 7, 1977.
227. 435 F.Supp. at 837.
228. Id.

229. Wilmington News Journal, July 23, 1977.
230. 435 F.Supp. at 837.
231. Transcript of hearing, July 22, 1977 at 826-828 and 864-878. Also, see Philadelphia Inquirer, July 24, 1977.
232. Morning News, July 28, 1977.
233. Id.
234. The source of this information asked to remain anonymous.
235. Morning News, July 28, 1977.
236. Id.
237. Id.
238. 435 F.Supp. 832.
239. Id. at 840.
240. Id.
241. Id. at 841.
242. Id.
243. Id. at 848.
244. Id. at 845 n.45.
245. Id. at 843.
246. Id. at 847-48.
247. Id. at 848-49.
248. Wilmington News Journal, Aug. 6, 1977.
249. Id.
250. Id.
251. Morning News, Aug. 9 and 11, 1977; Evening Journal, Aug. 12, 1977.
252. Morning News, Aug. 11, 1977.
253. Evening Journal, Aug. 18, 1977.
254. Morning News, Sept. 1, 1977.
255. Morning News, Sept. 9, 1977.
256. Id.
257. Wilmington News Journal, Sept. 23, 1977.
258. Id., Sept. 27, 1977.
259. 14 Del.C. 1001 et seq.
260. Sunday News Journal, Oct. 2, 1977.
261. Evening Journal, Oct. 3, 1977.
262. Id., Oct. 4, 1977.
263. Id.
264. Evening Journal, Oct. 4, 1977.

265. Id.
266. Id., Oct. 5, 1977.
267. Id., Oct. 19, 1977.
268. Id.
269. Transcript of hearing, Oct. 18, 1977 at A-231.
270. State Sen. Herman M. Holloway, Sr. (D-Wilm.). Morning News, Oct. 24, 1977.
271. Id.
272. Evening Journal, Oct. 20, 1977 (cite refers to all quotations following n.271).
272a. Morning News, Oct. 21, 1977.
273. Transcript of hearing, Oct. 18, 1977 at A-235-36.
274. Id. at A-236.
275. Morning News, Oct. 21, 1977.
276. Transcript of hearing, Oct. 20, 1977 at C-177.
277. Morning News, Oct. 21, 1977.
278. Transcript of hearing, Oct. 31, 1977.
279. Wilmington News Journal, Oct. 29, 1979.
280. Transcript of hearing, Oct. 21, 1977 at D-51. (also, see Wilmington News Journal, Oct. 22, 1977).
281. Id. at D-58.
282. Id. at D-51.
283. Id. at D-54-58.
284. Wilmington News Journal, Oct. 22, 1977.
285. Evening Journal, Oct. 28, 1977; Morning News, Oct. 31,1977.
286. Win Cleland and John Paris, Members, Student Assignment Committee, personal interview, July 21, 1978 (also, see Evening Journal, Nov. 23, 1977).
287. Id.
288. Evening Journal, Oct. 26, 1977.
289. Morning News, Nov. 8, 1977.
290. Id., Nov. 9, 1977.
291. Id., Nov. 15, 1977.
292. Id.
293. Id.

294. Dennis Carey, personal interview, July 21, 1978.
295. _Id_.
296. _Morning News_, Dec. 2, 1977.
297. _Id_., Dec. 1, 1977.
298. _Morning News_, Oct. 21, 1977.
299. _Sunday News Journal_, Dec. 4, 1977.
300. _Morning News_, October. 21, 1977.
301. _Id_.
302. _Evening Journal_, Nov. 29, 1977.
301. _Id_.
302. _Evening Journal_, Nov. 29, 1977.
303. See _Evening Journal_, Dec. 19, 1977, for a discussion of (a), (b) and (d).
304. _Morning News_, Dec. 14, 1977.
305. _Id_.
306. _Id_.
307. _Morning News_, Dec. 16, 1977.
308. _Philadelphia Inquirer_, Dec. 4, 1977.
309. _Sunday News Journal_, Dec. 17, 1977.
310. _Evening Journal_, Dec. 19, 1977.
311. _Id_.
312. _Sunday News Journal_, Dec. 18, 1977.
313. _Evening Journal_, Dec. 19, 1977.
314. Wilmington News Journal, Jan. 7, 1978.
315. _Evening Journal_, Dec. 23, 1977.
316. _Id_., Dec. 23, 1977.
317. _Id_., May 9, 1977.
318. _Id_., Dec. 23, 1977.
319. _Morning News_, Oct 10, 1978.
320. 447 F.Supp. 982 (D.Del. 1978.
321. 402 U.S. 1, 16.
322. 447 F.Supp. at 990.
323. _Id_. at 989.
324. _Id_. at 991-92.
325. _Id_. at 993.
326. _Id_. at 999.

327. _Id_. at 1000.
328. _Id_.
329. _Id_. at 1001.
330. _Id_.
331. _Id_. at 1002.
332. _Id_. at 1003.
333. _Id_. at 1004.
334. _Id_. at. 1004-05.
335. _Id_. at 1005.
336. _Id_. at 1008.
337. _Id_.
338. _Id_. at 1006.
339. _Id_. at 1012-13.
340. Id. at 1036.
341. _Id_.
342. _Id_. at 1015.
343. _Id_. at 1015-17.
344. _Id_. at 1036-38.
345. _Id_. at 1018.
346. _Id_. at 1019.
347. _Id_. at 1020.
348. _Id_. at 1025.
349. _Id_. at 1026.
350. _Id_.
351. _Id_.
352. _Id_.
353. _Id_. at 1028.
354. _Id_. at 1029.
355. _Id_. at 1018.
356. _Id_. at 1028.
357. _Id_. at 1029.
358. _Id_.
359. _Id_. at 1029-1032.
360. _Id_. at 1026-27.
361. _Id_. at 1034.

362. Id. at 1033.
363. Id. at 1035.
364. Morning News, Jan. 13, 1978.
365. Sunday News Journal, Jan. 15, 1978.
366. Wilmington News Journal, Jan. 19, 1978.
367. Unpublished court order modifying 447 F.Supp. 982, January 20, 1978.
368. Id.
369. Id.
370. Morning News, Jan. 25, 1978.
371. Id., Feb. 10, 1978.
372. Wilmington News Journal, Feb. 10, 1978.
373. Morning News, Feb. 17, 1978.
374. Wilmington News Journal, Feb. 25, 1978.
375. 447 F.Supp. 1041 (D.Del. 1978).
376. Id. at 1044.
377. Id. at 1045-46.
378. Id. at 1048.
379. Id. at 1049-50.
380. Id. at 1050.
381. Id.
382. Wilmington News Journal, April 22, 1978.
383. Morning News, Dec. 30, 1977.
384. 455 F.Supp 692 (D.Del. 1978), 695.
385. Id. at 695-96.
386. Id. at 700.
387. Id. at 694-95.
388. Id. at 698.
389. 515 F2d 1365 (8th Cir. 1975).
390. Id. at 1373.
391. 455 F.Supp. at 699.
392. Id. at 699, n.13.
393. Id.
394. Id.
395. Id. at 700.
396. Id. at 701-2.

397. _Id_. at 702.
398. _Id_. at 702.
399. _Id_. at 702-3.
400. _Id_. at 704.
401. _Id_. at 704, n.37.
402. Id. at 704.
403. _Id_. at 704-5.
404. _Id_. at 705.
405. _Morning News_, April 28, 1978.
406. _Evening Journal_, April 29, 1978.
407. Wilmington News Journal, May 13, 1978.
408. _Morning News_, Oct. 4, 1978.
409. Wilmington News Journal, Nov. 3, 1978.
410. _Evening Journal_, June 15, 1978.
411. _Sunday News Journal_, July 16, 1978.
412. _Evening Journal_, May 31, 1978.
413. _Id_., May 11, 1978.
414. _Id_., May 31, 1978.
415. _Id_., June 7, 1978.
416. See discussion of Evans VIII and IX, _infra_.
417. Wilmington News Journal, June 13, 1978.
418. 455 F.Supp. 705 (D.Del. 1978).
419. _Id_. at 710-11.
420. _Id_. at 714.
421. 455 F.Supp. 715 (D.Del. 1978).
422. _Id_. at 718.
423. _Id_. at 722.
424. _Id_. at 722-23.
425. _Id_. at 723.
426. _Id_.
427. _Id_. at 724.
428. _Id_. at 726-27.
429. _Sunday News Journal_, July 16, 1978.
430. _Id_.
431. Gilbert S. Scarborough, Jr., president, New Castle County School Board, personal interview, July 20, 1978.

432. 582 F2d. 750 (3rd Cir. 1978).
433. Id. at 778.
434. Id.
435. Id. at 779.
436. Id.
437. Id. at 779-80.
438. Id. at 758-61.
439. Id. at 763.
440. Id. at 764.
441. Id. at 766.
442. Id.
443. Id. at 770.
444. Evening Journal, July 25, 1978.
445. Morning News, Aug. 19, 1978.
446. Morning News, Aug. 15, 1978.
447. Morning News, Aug. 23, 1978.
448. Evening Journal, July 20, 1978.
449. Morning News, Aug. 1, 1978.
450. Morning News, Aug. 15, 1978.
451. San Francisco Chronicle, Sept. 12, 1978, Morning News, Sept. 13, 1978.
452. Morning News, Sept. 14, 1978.
453. For "Strike Chronology," see Morning News, Nov. 12, 1978.

455. Morning News, Oct. 13 and 14, 1978.
456. Id. Oct. 13 and 17, 1978.
457. Id., Oct. 19, 1978.
458. Id., Oct. 23, 1978.
459. Id., Oct. 26, 1978.
460. Id., Nov. 7, 1978.
461. Id., Nov. 10, 1978; Sunday News Journal, Oct. 22, 1978.
462. Id., Nov. 15, 1978.
463. Id., Nov. 14, 1978.
464. Id., Nov. 18, 1978.
465. Id., Oct. 10, 1978.

466. _Id._, Nov. 14, 1978.
467. _Id._, Nov. 20 and 21, 1978.
468. _Id._, Nov. 28, 1978.
469. _Id._, Nov. 29, 1978.
470. _Sunday News Journal_, Dec. 3, 1978.
471. _Morning News_, Nov. 29, 1979.
472. _Id._
473. _Id._, Dec. 7, 1978.
474. This information is based on a telephone conversation with Dennis Carey (see n.295, _supra_), now Administrative Assistant to New Castle County School Superintendent Carroll W. Biggs, March 9, 1979.

INTERVIEWS

1. Richard Allen, Attorney for Mt. Pleasant School District, July 19, 1978.
2. Dennis Carey, Administrative Assistant to the New Castle County School Superintendent and Member, Student Assignment Committee, July 21, 1978 and March 9, 1979.
3. Win Cleland, Staff, New Castle County School District and Member, Student Assignment Committee, July 21, 1978.
4. Mary DiVirgilio, Member, New Castle County School Board, July 20, 1978.
5. George Kirk, Deputy Superintendent of New Castle County School District, July 20, 1978.
6. Larry Negengast, Reporter, Wilmington News Journal, July 14, 1978.
7. John Paris, Staff, New Castle County School District and Member, Student Assignment Committee, July 21, 1978.
8. Jeffrey Raffel, Associate Professor, College of Urban Affairs and the Department of Political Science, July 17, 1978.
9. Joseph Rosenthal, Attorney for Plaintiffs, July 25, 1978.
10. Joseph Rule, Community Affairs Consultant, DuPont Company, July 18, 1978.
11. Gilbert S. Scarborough, Jr., President, New Castle County School Board, July 20, 1978.
12. John P. Sinclair, Attorney for Newark School District, July 21, 1978.
13. Mason Turner, Attorney for State Board of Education, July 18, 1978.
14. Caleb M. Wright, U.S. District Court Judge (D.Del.), July 26, 1978.

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DALLAS

Timothy Gage

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Prior History of School Desegregation Litigation in Dallas

The history of school desegregation litigation in Dallas begins with *Bell v. Rippy* in 1955.[1] After reversing the district court several times, the Appeals Court, in 1960, ordered the desegregation of the city schools by successive grades, so that each year one grade would be desegregated. In 1965, the Appeals Court twice ordered the school district to desegregate the twelfth grade. Neither order directed the district to take any affirmative action but merely required the elimination of racial criteria in student admissions.

Summary of the Suits

In 1970, suit was filed against the Dallas Independent School District by plaintiffs representing classes of black and Mexican-American students and parents requesting the desegregation of the school district. After hearings on the liability of the district and having found the district guilty of segregation, Judge Taylor ordered the submission of plans. Taylor reviewed the plans and ordered the implementation of a plan which included the use of television in elementary schools to increase integrated contact among students.[2]

The school district appealed the court's order and shortly thereafter Taylor stayed that part of his order regarding the busing of secondary students. Taylor asked the district to draw up another plan for the reassignment of their students which he then adopted.

The Appeals Court ruling did not appear until nearly four years later in 1975. The court held that the district court's "television plan" was inadequate and ordered Taylor to draw up a new plan.[3] A school district request to the Supreme Court for a stay of the Appeals Court order was denied.[4]

At this point Judge Taylor permitted the intervention of a number of other parties representing various interests in the community, including the Dallas Alliance, a Chamber of Commerce sponsored organization involved in a number of social issues. In December of 1975, hearings began on the formulation of a new desegregation plan. On March 10, 1976, Taylor handed down an order which largely adopted a plan that had been formulated by the alliance; he directed the school district to prepare the student assignment portion of the plan. The final order, which appeared in April, involved the busing of approximately 17,300 students.[5]

Not long after that order was entered, the NAACP appealed the court's plan citing the fact that a number of schools remained all black under the plan. Other parties quickly filed cross-appeals. Despite these appeals a significant portion of the plan was implemented, with the strong support of the business community, including the development of a number of "magnet" schools.

In April of 1978 the Court of Appeals remanded the plan back to the District Court to determine whether natural boundaries or traffic considerations precluded the use of transportation or pairing or clustering to eliminate the large number of one-race schools still remaining in the school district.[6] The school district appealed the remand to the Supreme Court and hearings are set for the fall of 1979.

Dallas - the City

Dallas, Texas, the second largest city in the state, was first established in 1841 by a Tennessee lawyer who set up a trading post on the banks of the Trinity River, and later incorporated in 1856. The arrival of rail transportation in 1872 was the first big step for the city towards its becoming a major Southwest distribution center. From this beginning Dallas has become one of the leading wholesale marketing centers in the nation.

In addition to being a marketing center, Dallas is an important agricultural area, particularly with respect to cotton. And the early wealth of the city was largely a product of nearby oil fields. In the late 1940's and early 1950's Dallas saw the emergence of the manufacturing and financial sectors of its economy, beginning with the aircraft and electronics industry up to becoming the 11th district of the Federal Reserve Bank. Today, Dallas is third in the nation in the number of companies with assets of $1 million or more, according to Dun & Bradstreet's "Million Dollar Directory."

Dallas is the seventh largest city in the U.S. with an estimated 1978 population of 884,850. 1977 median household income was $16,620. Home of the nation's largest airport in terms of total area, Dallas is also the largest city in the U.S. operating under a city council-manager form of government. Despite its cosmopolitan atmosphere deriving from the rapid growth of the corporate sector of its economy, Dallas has remained in many respects a fairly conservative city. Nevertheless, it has been an innovative city as well, especially more recently with respect to its approach to school desegregation.[7]

According to Dr. Emmett Conrad, the first black member of the Dallas school board, the masses of blacks in Dallas have never been involved in political issues nor have they had access to the political machinery of the city. By the early 1970's there were two blacks who held elected positions of power in Dallas; one was a state legislator, the other a city councilman. But according to Dr. Conrad, both of these people were "anointed by the white downtown power structure," so that they were not representative of the mass of blacks in Dallas.[8]

The first black to be elected who opposed or at least was not chosen by the downtown power structure was Zan Holmes who was elected to the state legislature in 19 . Beginning in 1972, seats in the state legislature from Dallas were chosen by district rather than at-large.

The School Districts

Dallas provided public education through the high school grades in a traditional fashion through the early 1920's. At that point, however, the city developed a number of innovative programs, including the use of portable buildings, special education programs and the development of team teaching. The legal footing for school districts as independent political subdivisions of the state was firmly established by 1947.[9]

Prior to 1974 school board elections in Dallas were at-large. The League for Educational Advancement in Dallas (LEAD) was formed in 1965. In 1968, LEAD, which was considered a fairly liberal organization, took control of the school board. This led to a somewhat progressive policy regarding desegregation, including voluntary efforts on the part of the school district to desegregate the faculty of the Dallas schools.[10]

In 1971, LEAD lost control of the school board to the somewhat more conservative Committee for Good Schools (CGS), which had dominated school board elections for decades. CGS held the board for about 3 years after which time district elections for the school board were instituted. Regarding the issue of desegregation of the public schools as politically very troublesome, neither LEAD nor CGS took a strong public stand on the issue of desegregation by the time the hearings started in the case in July, 1971. Most of the representatives of these organizations either said nothing about busing or spoke out against it.[11]

Dr. Conrad became the first black member of the board in 1967; he attributed his victory to massive support from the black community and good financial support from whites. When he joined the board, schools in the city were labeled white and black and that there was no free lunch program. He said that the board operated as a rubber stamp and that no one would second his motions.[12]

The Judge

The district court judge assigned to the Dallas school desegregation case in 1970 was William "Mac" Taylor. Taylor is no stranger to the judiciary - his father served as a state court judge for many years and retired from the Texas Supreme Court in 1950. He attended the University of Texas and Southern Methodist University Law School and was 61 when the school desegregation suit was initially filed in 1970. After graduating from law school Taylor worked for a period of time as an assistant city attorney, and then , in 1939, he entered private practice. He then served as a state court judge from 1949 to 1953 at which time he resigned and returned to private practice until he was appointed to the federal bench in 1966 by President Johnson.[13]

About Judge Taylor, school district attorney Warran Whitham said that he was "patient and fearless" and that he was a listener. This last characteristic was seconded by many of the other people involved in the case. Taylor himself said that he doesn't like to rush things, and for that reason he is willing to listen to lots of testimony. Whitham said that Taylor generally "lets the lawyers make their case," but that sometimes he will "ride your ass" if you get out of line in the courtroom. He also stated that Taylor is not carried away with his own importance.[14]

The issue that Taylor seems to regard as most important, Whitham said, was his concern for the children who would be affected by the outcome of the suit. Whitham confirmed what is apparant from Taylor's conduct during the hearings in the case, that he is "trying to get people to reach a common ground."[15] Referring to Taylor's attempts to get the parties to negotiate over a settlement, school board president Bill Hunter said that Taylor "simply made public what happens in litigation privately."[16]

About his accessibility, Taylor said, "There was a time when federal judges were unapproachable by anyone. But I happen to be a First Amendment man. I believe freedom of speech and freedom of press are our most important freedoms. My work is the public's business, and who am I that I should withdraw to some kind of ivory tower." Taylor reportedly returns all of his phone calls personally. "I want to talk to people and hear their views, but at the same time a judge can't try his cases over the phone. When the time comes for a decision, I have to make it in the best way I know how at the time."[17]

Commenting on his role in the courtroom, Taylor said, "I call 'em like I see 'em. I've always done that, even while I was a state court judge." One Dallas attorney told a reporter, "Judge Taylor is a fine lawyer, but what really sets him apart is that you can always count on him to be a fair and reasonable human being."[18] According to another reporter, Taylor's "soft-spoken, even-tempered approach, coupled with a keen sense of humor and a strict adherence to the law as he interprets it, has earned him an enviable reputation. In a poll of the members of the Dallas Bar conducted in 1975, more than 90 of the lawyers approved of the way in which Taylor conducted his courtroom.[19]

Although newspaper reporters are reluctant to characterize Taylor as either a liberal or a conservative, Rene Martinez described him as an "FDR Democrat," and said that Taylor was Yarborough's campaign manager in 1966.[20]

In newspaper reports, Taylor was described as a popular judge but one of whom an acquaintance said he "will not be swayed by political or public pressure."[21] Martinez said that it was his feeling that Taylor doesn't mind being reversed that much, however. When asked by reporters whether he minded making decisions in controversial, highly publicized suits, Taylor said, "That's what I hired out for."[22] But Taylor said in another interview, "Sometimes it seems I've been embroiled in some kind of controversy ever since I've been on this bench. I had my first 'longhair' suit two weeks after I was sworn in. That's what started it, and it's been going on pretty steadily ever since."[23] The case to which he was referring was Ferrel v. DISD (261 F.Supp 545 (1966)) in which Taylor upheld the school district's right to enforce school appearance codes that did not permit long hair. Three students were expelled by the school district for not complying with the codes, and Taylor's ruling was affirmed by the Court of Appeals. Taylor admitted to the reporter that changing public attitudes would make it implausible to rule on hair length in 1975. "Times change. Now most kids have long hair."[24]

In addition to the "longhair" case, Taylor has heard a number of other suits involving the schools and desegregation. In Ware v. Estes (328 F.Supp 657 (1971)), a case involving the use of corporal punishment in the Dallas schools, Taylor ruled that the school district was within its rights in the use of corporal punishment of students. While in his opinion Taylor discussed the views of a number of educational and psychological experts regarding the pros and cons of corporal punishment he also stated, "It is not within this court's function, or individual competence, to pass judgment upon the merits of corporal punishment as an educational tool or a means of discipline. The wisdom of the policy is not the court's concern."[25] He also quoted from the Supreme Court's opinion in Epperson v. Arkansas[26] to the effect that, "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint....Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."[27] Taylor later told a reporter regarding his decision in Ware, "I don't think this court should sit as a super school board."[28] Nevertheless, Taylor is sensitive to educational concerns; in Ferrel he stated at one point, "One of the most important aims of the school should be to educate the individual to live successfully with other people in our democracy."[29]

In another suit involving student dress codes, Taylor attempted to get students and administrators talking to each other so as to get as many students who had been suspended back in school as possible. He said, "I have tried to keep the benefit of the students, above all other considerations, uppermost in my mind in these cases. When tempers get hot, I try to cool things down and get a reasonable dialogue going between the parties. The school authorities had a right to prevent disruption but at the same time the issue of free speech was involved. I felt that the most important thing was that they continue their education."[30]

In a desegregation suit in Richardson, Texas, Taylor issued an order in 1970 that permitted an all-black elementary school to remain in Richardson while junior high school students were integrated. In 1974, the Justice Department asked Taylor to reconsider and order the elementary school integrated. He denied the request but was reversed by the Fifth Circuit. After that reversal, he told the group assembled in the courtroom, "We all have a job to do under the Constitution of the United States. We allenjoy the benefits; certainly we should accept the responsibilities and obligations."[31]

According to reporters present in the courtroom during his cases, Taylor spends much of his day on the bench drawing a variety of geometric designs with rulers, protractors and compasses, and the scores of colored marking pens which he keeps with him on the bench.[32] Taylor's own impression of himself and the way that he would like people to think of him are perhaps best displayed by the way in which he introduced himself: quite simply as "Mac" Taylor, and by a comment that he made: "Judges are simply human beings; they put their pants on like everyone else -- one leg at a time."[33]

The Suit

In March of 1970, Dr. Conrad commented on the desegregation of the Dallas schools. He said that the Dallas schools were not effectively integrated, and continued, "I'm still not satisfied with the progress in desegregation, but as long as progress is being made it tends to give hope for the future. And Dallas is making progress."[34]

The occasion for his comments was the release of an HEW report that showed that the percentage of minority students attending schools with a minority enrollment of greater than 95% was 82% in January of 1970.[35]

Later that year, in October, the Superintendent of the Dallas Schools, Nolan Estes, argued before a group of Dallas school administrators that success in school integration depends greatly on the cultural awareness and leadership of the administrators. He went on to say that he was committed to the concept of neighborhood schools and believed that forced busing and court suits to achieve racial integration are divisive. Ironically, Estes made these comments the day before suit was filed against the school district for its alleged failure to desegregate the Dallas schools. In this same speech, Estes argued that Dallas had avoided recent court suits because of good faith efforts to provide quality education to students of all races.[36]

Suit was filed on October 6, 1970, by four attorneys from the Dallas Legal Services project on behalf of 21 black and Mexican-American students enrolled in the Dallas schools. The lead counsel for the plaintiffs in the case was Edward Cloutman III, who was 25 at the time the hearings in the case began. He headed a team of lawyers from the Dallas Legal Services Project. Commenting that he "(sought) the services people really need basically, those for underprivileged people," Cloutman prepared to show that the Dallas school district was still not a unitary system. Cloutman was trained at Louisiana State University Law School and had been out of school only two years by the start of the hearings.[37]

Two additional attorneys joined in the suit: Melvin Leventhal from the Legal Defense and Education Fund of the NAACP, and Mario Obledo who was then with the Mexican-American Legal Defense Fund. The suit asked that construction of new schools and the purchase of school sites be enjoined if they did not promote desegregation. In addition, the court was requested to order the Dallas Independent School District (DISD) to develop a comprehensive plan for desegregating its tri-school system of whites, blacks, and Mexican-Americans by the spring semester of 1971.[38]

The plaintiffs filed the suit because they felt that the 1965 federal court order to DISD to desegregate its school was no longer adequate. DISD had been ordered to complete a grade-a-year desegregation play by the 1972-73 school year, but as the HEW report mentioned above documented, the school district was far from meeting its timetable.

According to Edward Cloutman the plaintiffs first went to the NAACP in 1970 to get them to file the suit before they came to the legal aid office, but they were reportedly told by the NAACP that the problem had been solved.[39]

In addition to asking the court to order a comprehensive desegregation plan, the suit requested the formulation of a "tri-racial" committee comprised of an equal number of whites, blacks, and Mexican-Americans, which would be responsible for advising the school district on desegregation. The suit also requested that a program be established to sensitize school personnel and school board members to the cultural and racial differences of the students.

Reaction to the suit by school district officials and school board members was generally positive. Superintendent Estes commented that he welcomed it since it would give the school district the opportunity to display its record on integration. "We have an outstanding record and I welcome the opportunity to point with pride to our achievements." Dr. Conrad said that he was not surprised at the suit, but he continued, "I don't think that we have anything to fear in going to court. Everything will come out in the open and if we are at fault, we can move to correct it; if not, we can have our record explained." The sole Mexican-American member of the board said that "there is much that needs to be done for minorities, but I see more being done here than other places." He also said that he would prefer not being taken to court; that he would like to work the problems out out of court. Finally, Estes, arguing that integration in Dallas was far ahead of progress in other large school districts in the nation, said, "We move voluntarily because we know we have to and because we want to. This has produced a confluence rather than a crisis in our schools."[40]

The lead attorney for the school district was Warran Whitham, a 44 year old member of a small firm in Dallas - Spafford, Gay and Whitham. By 1971, Whitham had been with the firm 18 years, and described himself as a "poor country lawyer." Whitham evidenced his unfamiliarity with certain segments of the Dallas population in having difficulty pronouncing "chicano," but he himself told school board members on one occasion that they "were going to have to live with the times. You may not like it, but things are changing." Whitham was unwilling to discuss the case with the author in any detail, but was not unfriendly.[41]

Shortly after the suit was filed, and at the request of the plaintiffs in the case, Judge Taylor requested the federally funded Texas Education Desegregation Technical Assistance Center (TEDTAC) in Austin to do a study of the Dallas schools. Commenting on his request Taylor said, "TEDTAC will be like any other expert witness in a trial. They are doing a detailed study at the court's request. TEDTAC's director, J.P. Williams, met with Superintendent Estes to work out the details of the study and said that he would also meet with the plaintiffs' attorneys.[42]

In his first public comments on the suit in November of 1970, Judge Taylor said that the Dallas public schools would not be disrupted during the 1970-71 school year. Taylor also refused to order a preliminary injunction of the construction of several schools in view of the fact that the plaintiffs had not come up with evidence that the construction would promote segregation, saying that stopping construction would be "entirely too expensive and disruptive for the contractors and the school district." He went on to say that the court was open to possible future action on the request for halting construction: "These matters are kind of like child custody. The court always has jurisdiction."[43]

Plaintiffs appealed Taylor's refusal to order a halt of school construction, and in June of 1971 the Fifth Circuit reversed Taylor's decision, saying that he had erred in placing the burden of proof that the school construction would promote segregation on the plaintiffs. Taylor was ordered to halt construction unless school officials could prove that the locations of the new buildings were not keeping white students segregated from minority students. Later that month, Taylor again refused to halt construction of two predominantly Black schools, saying that he could find no court decisions in which a judge enjoined school construction actually in progress. He said that stopping the projects now would do irreparable harm to the contractors and that other uses could be made of the schools. He did order the school district to refrain from contracting for the construction of any new schools and selecting school sites.[44]

Meanwhile, the date for the first major hearing in the suit was set for July 12; the parties were to receive copies of the TEDTAC study several weeks prior to that date so as to give them an opportunity to study the findings. In a closed meeting before the report was made available, Taylor ordered the parties not to comment on the case under the threat of contempt. "We've got to try this case in court, not in the press," Taylor said.[45]

As the TEDTAC plans were prepared school officials expressed some concern over the effect that these plans might have on several of the district's programs directed toward minority students. The district's top Mexican-American administrator was particularly concerned that if the Mexican-American students were ordered to be distributed throughout the district's 183 schools the concentration of Mexican-American students in each school would be too small to be reached through the district's bilingual programs. Concern was also expressed over the district's new Skyline Career Development Center which was expected to open in the fall of 1971 with a predominantly white student body. Officials feared that plans ordered by the court might entail the loss of the new $21 million program.[46]

Despite Taylor's caution to the attorneys in the case, a description of the TEDTAC plans appeared in the press before it was filed in court. In all, eight plans were presented in the report that the attorneys received for study; three for high schools, three for junior high, and two for elementary. The rationale underlying the plans, according to the newspaper account, was that neighborhood patterns which lead to all-white or all-black schools must be changed. Three sets of plans were discussed in the report: A and B which would involve extensive changes to school boundary lines, pairing and clustering, and busing. Schedule C, which was favored by TEDTAC, would have changed high school boundaries extensively, junior high less extensively, and elementary school boundaries would have remained the same. Included in this plan was the use of television for elementary schools and weekly field trips.[47]

The TEDTAC director, Williams, had hoped to develop plans that were acceptable to both of the parties in the suit. Toward that end, the attorneys for the plaintiffs met with Williams to suggest changes in the plans.[48] School officials, however, refused to become involved with TEDTAC in the development of the plans. Superintendent Estes left a meeting with TEDTAC personnel without making any comments or suggestions concerning the plans. The school board voted unanimously to refrain from cooperating in the formulation of the final integration plan. According to newspaper reports, this action was taken by the board in the belief that a costly and unpopular plan was sure to be ordered by the court and that they had nothing to gain politically from becoming involved in or associated with the development of the plan. Apparently, some school officials hoped that Taylor, being a native of Dallas, would go easy on the schools. But they were aware that this might not happen and that the board was taking a chance on having the plan appealed to the Fifth Circuit.[49]

Because of the lack of cooperation from the school board, Williams and his staff decided not to submit Schedule C, the set of plans that included the use of television in the elementary schools, to Judge Taylor for his consideration. "Because the plan was entirely dependent upon its voluntary acceptance by school officials, we cannot now recommend the plan," said Williams. Concerned over the leak of the plans to the press, Williams also said that they planned to speed up the presentation of the plans to the court.[50]

Public outcry against the plans was swift. A few days after they appeared in the paper, a group of over 1,000 parents met to discuss strategy, including the circulation of petitions and advertisements in newspapers.[51]

Later that week, and probably to some extent in response to the public outcry, the school board made its first public statement since the suit had been filed. They declared that they would defend the concept of neighborhood schools to the highest court in the land, if necessary. The president of the school board stated that this public statement by the board did not violate their attorneys' advice to remain silent since they were not making any statement that would reflect on the trial in the case. The board president said that the board's statement was designed to place the trustees (board members) clearly out front as leaders in defending the school district. "Anticipating that some persons in our district might interpret our silence as implying inaction in the board's part in behalf of all our citizens, we would like to assure the public that we are committed to the defense of the lawsuit to the end that each child in the district, regardless of race, color, or creed, shall have quality education."[52]

Another segment of the Dallas public was soon to become concerned about how they would fare under whatever plans the court implemented; attorneys for the school district filed a motion with the court asking Taylor to lump Mexican-Americans with whites for the purpose of the desegregation case. In response to the request, over 200 representatives from nearly all of the Mexican-American organizations in Dallas met to draft a letter to school officials and the judge protesting this classification and the school district's assertion in the motion that Mexican-Americans cannot be meaningfully defined as a group.[53]

A few days later Superintendent Estes testified in a pre-trial deposition that it is not possible to identify a Mexican-American. "I don't know what a Mexican-American is. The only way we can tell is if they have a Spanish surname, but they could be from Cuba, Columbia, Ecuador, or Chile." The representatives of the Mexican-American group decided that they would meet with Estes to define Mexican-American for him.[54]

Shortly before the trial began, the Dallas Morning News obtained a copy of a confidential study comparing black and white high schools in Dallas on a variety of measures. The survey revealed that predominantly black high schools were significantly inferior in almost every standard, including teaching ability, student attendance, career goal attainment, and student achievement in reading and other verbal skills. School district personnel who conducted the study had planned to release it to the school board and the public but decided not to since it was feared that the report might damage the school district's defense in the suit.[55]

On July 2, TEDTAC representatives submitted their report including a proposed plan to the court. It contained the most far-reaching of the three sets of plans that were considered by the group -- extensive pairing and clustering of schools, including elementary schools -- in an attempt to bring about a ratio of 60 percent white, 30 percent black, and 10 percent Mexican-American in every school in the district.

As they had planned, TEDTAC personnel dropped the less extensive plan that included television for the elementary schools because they were unable to get school officials to discuss it with them. One of the attorneys for the school district told TEDTAC officials that the school board had reviewed each plan and found them to be a "blueprint for the destruction of the Dallas school system," according to the preface of the report that went to Taylor. The report continued that "His statement came as a shock to TEDTAC representatives, especially in view of the cooperation received from school officials prior to that date."[56]

The TEDTAC plan would have eliminated all one-race schools in Dallas and would have done away with the city's plans for a Career Development Center in the Skyline High School.

At the pre-trial hearing held on July 6, school board attorneys argued that they would offer no plan of their own during the trial, since "the plaintiffs have the burden to prove that we're out of compliance with the law." Superintendent Estes said that all the school district would offer were its own good faith efforts to comply with the law and recent Supreme Court rulings.[57] School district officials, then, simply planned to defend what they referred to as their "confluence of cultures" plan, which supported integration on a gradual basis as neighborhoods became integrated. The superintendent did not support the idea of significant mixing of students and faculty. "Wholesale reassignment of students and teachers is educationally unsound and leads to conflict not confluence," Estes said.[58]

At the conference, Judge Taylor declined to grant a school district motion for dismissal of the case on the grounds that the school district had complied with a 1962 court order forbidding a dual school system. He also reserved judgment on the issue of lumping Mexican-Americans with whites and stated that the TEDTAC plan was only a proposal. Taylor also permitted the intervention of James T. Maxwell, the parent of three children who would be attending Dallas schools who said that the adoption of the TEDTAC plan by the court would work a severe hardship on him and his family for financial and transportation reasons.[59]

A few days after the first pre-trial conference, a second meeting was held between the parties and the judge at which Taylor said that he would permit the school board to come up with a plan for the court if deficiencies in the present operation of the school district were found, but that they would have to come up with such a plan virtually forthwith since he would not permit the trial to be broken up into two separate proceedings. School board attorney Whitham had earlier told Taylor that the school board had no alternative plan and had no intention of drawing one up prior to the trial.[60]

Despite Whitham's statement to the contrary, the school board was holding confidential meetings at the same time as the pre-trial conferences to discuss an alternative plan for the school district in the event that Taylor found their current policies inadequate. According to a newspaper report, the school board, the superintendent, and several members of the district's staff were meeting to develop a less radical integration plan for presentation to the court if Taylor ruled against them. Most of the board members refused to comment on the issue of a plan, but one member reportedly said that the district would be stupid not to develop an alternative.[61]

While school board members were grappling with the question of what sort of public stand to take, several members of the Dallas City Council were strongly encouraging that body to intervene in the suit so as to make clear the extent to which the city could be adversely affected by the outcome of the case. Initially, several members of the council were successful in convincing the group to vote to intervene in the suit. But a few days later, the city attorney, after studying the issue, reported to the council that he did not feel that the city was legally in a position to intervene. He explained that while the city had a definite practical interest in the case, he did not think that it was in a position to affect the outcome of the case from a legal standpoint.[62]

On the basis of this advice the council voted to remain neutral and not intervene in the suit. However, it did pass a resolution expressing "concern and desire that quality education be afforded to each citizen." Two members of the council, Gilmore and Price, were particularly upset that the council decided not to intervene in the suit.[63] Mayor Wise stated that he intended to maintain a neutral position in the case because he felt that he would be called upon to play the role of mediator, but he was apparently accused in the council's closed meeting of straddling the fence on the issue.[64]

Shortly before the hearing in the case actually began, Judge Taylor was interviewed by a reporter from the Dallas Morning News, at which time he said, "Lawsuits are like people. We don't have the same fingerprints. We are all different." Taylor declined to comment on similarities between the Dallas case and the recent Supreme Court decision in Swann since he felt that if he said anything people would think that he had made up his mind about the suit.[65] He said, "We'll just have to fly by the seat of the pants on this thing and see what happens." He also commented that he would willingly trade places with the judges who had to decide the Pentagon Papers case.[66]

The Trial

At the start of the trial on July 12, Taylor again pointed out that the TEDTAC proposal was simply that. He said that he wanted to make it abundantly clear that he asked TEDTAC to come up with a proposed desegregation plan, "not to decide this case." He said that TEDTAC has "an expertise much like the role of an expert witness."[67]

School board attorney Whitham reiterated the intention of the school district to rely on its past record and make no proposal for redistribution of students. Taylor responded by telling school officials that he would call on them to prepare a plan if he found deficiencies. "If there are deficiencies, the first thing I would do would be to call on the school board to correct these deficiencies."[68]

Taylor permitted the intervention of a white North Dallas group, the Greater Dallas Council of Citizens for Neighborhood Schools, consisting of five parents representing 21 children. He stated, however, that the group must, "take the case as they found it and participation will be limited as to the issues between the plaintiff and defendant." The school district opposed this intervention on the ground that it would complicate the conduct of the trial, but the plaintiffs expressed no objection.[69]

Whitham reported that the school board was willing to redistribute faculty by the opening of the next school year so that each school would have a ratio of approximately 25 percent black and 75 percent white teachers. School officials apparently felt reasonably certain that the court would order proportionate faculty integration so that little would be gained by waiting for Taylor's order. Newspaper accounts reported, privately, that school officials were concerned that faculty reassignment might result in a landslide of resignations. Prior to the announcement in court that the school district was willing to proportionately integrate the Dallas schools, they had simply planned to call for voluntary faculty transfers, but it was clear that such transfers would not bring the district close to its goals. Superintendent Estes declined to comment on how the district would implement the proportionate integration plan.[70]

While continuing to maintain that the school district was in compliance with desegregation law, Superintendent Estes conceded during the trial that the school district would expand its majority-to-minority transfer plan so that students who transferred would have free transportation. One of the plaintiff's attorneys pointed out that the school district had not decided to make any of these concessions prior to the trial, and when he pressed Estes on this point, the Superintendent replied, "We made no official public announcement because we wanted to try this case in the courts, not in the press."[71]

During the liability phase of the trial, the school district did not challenge the existence of 120 one-race schools. This fact along with the case that the plaintiffs made that the large number of one-race schools was at least in part the result of the district's neighborhood schools policy convinced Taylor to deny the district's motion for a dismissal of the case. The school district's attorneys then proceeded to present a defense of the district's policies, which consisted of attempting to show that the district had made no school siting decisions or boundary changes based on race and that the district bore no affirmative duty to compensate for the segregative effects of housing or other non-school policies.[72]

Following the presentation of the school district's defense, the trial was recessed for a brief period in anticipation of Taylor's ruling regarding the liability of the school district. During this time, the school board continued to maintain that it was in compliance, but privately members of the board acknowledged that they expected an unfavorable ruling from Taylor. According to a school board document obtained by the Dallas Morning News, the board's public position was maintained for the sake of public relations. "The public will think the board is solid for the neighborhood school." The document went on to acknowledge the disadvantages of this "no plan" strategy: "It is unrealistic in light of new benchmarks since Swann," and "it has accomplished nothing positive but maintained segregated systems."[73]

Consistent with their expectation of an unfavorable ruling from Taylor, the school board was at this point putting the finishing touches on three alternative desegregation plans. Another confidential document apparently intended to accompany the desegregation plans discussed the merits of the board's favorite plan which would maintain neighborhood schools. This plan, according to the document, "would reduce the chances of court approval of the TEDTAC plan, but might irritate the judge." It would also "maintain neighborhood schools, but the Justice Department might intervene." Finally the document noted that the plan "may preclude coming back with an acceptable plan since the district had eight months during pendancy of the suit."[74]

Commenting that "it is difficult for me to believe that anyone anywhere would be surprised, shocked or amazed by what I am about to rule in this case at this time," Judge Taylor ruled that segregation existed in the Dallas school system, ruled that Mexican-Americans are a clearly identifiable ethnic minority, and appointed a tri-ethnic committee to aid the school board in producing an acceptable desegregation plan. He suggested that the school board make "the confluence of cultures" an actuality rather than a catch phrase, and ordered the board to make significant changes in the racial composition of Dallas schools, but added that he would prefer a plan that accomplished the necessary desegregation without massive busing. He also cited the TEDTAC plan that utilized television for elementary schools that had been rejected by the school board. "What better way to open lines of communication than to say 'I saw you on television yesterday'. TV is cheaper and safer than busing," said Taylor.[75]

As members of the tri-ethnic committee, Taylor named a black legislator, Zan Holmes, a Mexican-American assistant director of the Greater Dallas Community Relations Commission, Rene Martinez, and the white attorney for the Citizens for Neighborhood Schools, David Kendall, and asked the school board members to cooperate with the plaintiffs, the tri-ethnic committee, and TEDTAC in eliminating the vestiges of segregation root and branch. He said that he hoped that the school district would utilize the tri-ethnic committee and the plaintiffs' attorneys in formulating a plan. "Of course they may choose not to, and the ultimate decision will be up to me." At this point the plaintiffs' attorneys indicated that they would submit their own plan. Both parties also stated that if unsatisfied with

Taylor's final ruling on a plan, they would appeal to the Fifth Circuit. Taylor commented, "Both parties have had the Fifth Circuit looking over my shoulder since this began."[76]

Taylor also defended TEDTAC which had come under attack by the public for its proposed desegregation plans. "TEDTAC has been harassed, intimidated, pressured, and abused and it did not deserve this type of treatment. I have considered the entry of an order that such harassment, intimidation, and threats will be considered an obstruction of justice and therefore in contempt of this court," said Taylor.[77] TEDTAC director Williams said that the harassment to which he and his staff had been subject as a result of their work on the desegregation plans was the worse in Dallas than in the some 40 other districts in which they had worked previously. He said that he changed his telephone number and sent his family on vacation to escape public outcry.[78]

After Taylor's ruling on the liability of the school district, school board members indicated that they would be willing to meet with the members of the tri-ethnic committee to discuss a plan, but apparently were less inclined to meet with the plaintiffs. "The judge suggested we hear from them (the plaintiffs), but he did not order us to," said one member of the board.[79]

The board then began their work by studying the television plan that they had initially rejected. A plan utilizing television hook-ups for the elementary schools and some boundary changes was presented to the tri-ethnic committee in a meeting that was described as "harmonious." After meeting with the tri-ethnic committee and discussing their proposed plan with TEDTAC director Williams, the school board released the final version of the plan to the press. The plan, which was initially proposed by Superintendent Estes, would have left one all black high school, eliminating other one-race high schools primarily through the use of boundary changes and some minimal busing of black students to predominantly white schools. Television and some slight boundary changes were to be used to integrate the elementary schools. The final version of the plan was nearly identical with the one initially proposed by TEDTAC.[80]

The members of the tri-ethnic committee appeared to be satisfied with the plan, at least initially, except for a desire to include some compensatory education programs and human awareness courses.[81] Rene Martinez, the Chicano member of the tri-ethnic committee said, however, that he would submit a list of requests for more Chicano administrators and faculty directly to the judge because he feared that the school board would not do so.[82]

The plaintiffs' plan, which closely resembled the more extensive plan that TEDTAC ultimately presented to Taylor, called for crosstown busing of elementary school students and changes in school boundary lines to integrate the secondary schools.[83]

After the school district TEDTAC plan was released to the press, some members of Dallas' black community expressed their opposition to the closing of a number of black schools as proposed by the plan. In a community meeting sponsored by the black member of the tri-ethnic committee, Rev. Zan Holmes, community leaders said that they opposed the closing of black schools only and massive busing unless it were necessary to obtain quality education for black students. They said that they preferred some schools with a black majority and did not favor proportionate integration of the faculty at every school.[84]

At a meeting with school officials tri-ethnic committee member Holmes voiced his opposition to blacks carrying the burden of busing:

to the newspaper report, decided that they would be better off to let Taylor order a plan rather than be associated with a compromise plan. During the negotiations, Williams acted as a mediator, meeting separately with the plaintiffs' attorneys and school board members to attempt to reach a compromise. The main stumbling block at this stage of the negotiations was that the school district officials did not think that it would be possible to transfer white students to black schools, a move that was required if one-race schools were to be eliminated.[88]

After four days of meetings, the negotiations failed to produce agreement. Though school officials again softened their position and attempted to reach a compromise by making concessions with respect to secondary school integration in order to avoid an appeal of the play by plaintiffs that might jeopardize the television plan for the elementary schools, the plaintiffs were unwilling to agree to a settlement.[89]

Following the breakdown of negotiations, Taylor ordered the parties back into the courtroom in order to take testimony on the plans which would be particularly important in the event of an appeal. At this point, Taylor restated his position that his earlier opinion and the mention of the television plan was not a final determination but simply a suggestion of a possible solution.[90] As it became clear that the plan would cost about $10 million to implement he said that he had not thought that it would cost that much.[91]

During this part of the trial Judge Taylor showed considerable interest in the television plan and asked a number of witnesses questions about its potential:

> Let me ask this, Dr. Estes: now, the plan with the television, as contemplated, does not provide for any actual physical integration of the pupils, students, other than as would be provided in your elementary plan as laid out now?

> (Estes) That's correct.
>
> If it were possible to accomplish this, ...would that pure physical integration be detrimental to the plan that you have?[92]

And later:

> Dr. Estes, do you feel that the purpose of the Board in coming up or working with this TV concept or TV tool is to keep or maintain or perpetuate segregation?[93]
>
> ....
>
> Well, then, you're telling me also that you think or that your Board or its idea is to use this tool or device towards the end of desegregation?[94]

On a number of occasions, Taylor makes it clear that he is most concerned about the quality of the education that the children will receive in the schools; after one witness has described a part of a plan that would involve bringing students together on field trips and cultural activities, Taylor asked:

> Let me ask you this: you concede this to be one of the tools for the end result of equality of education?
>
> In other words, the education that a child in an all-black school in South Oak Cliff would get would be equal to that of a white child somewhere in the North part?[95]

Taylor's concern for educational issues is also evident in his question to Superintendent Estes:

> But, as I understand you, Dr. Estes, there is some educational advantage to maintaining the neighborhood school concept in the elementary grades, if I understand you correctly?
>
> (Estes) There is no doubt about it, Judge.
>
> Tell me what you mean by that.[96]

And later at the conclusion of the trial:

> And after all, isn't that what we are talking about really? Is education of kids, equal education, equal quality education. And it is the Board's Confluence or Cultures plan and its other features in its plan that convinces this Court that in good faith it seeks to provide quality education equally for all races, colors, and creeds.[97]

Taylor's concern for issues outside the range of strictly legal matters extended to athletic programs:

> Now, I may be premature in asking this question, but just for example, what is that going to do, if anything, to the South Oak Cliff athletic program?
>
> Well, that's the very question I had in mind. In other words, if your quarterback is in that area, then he would be going to Carter?[98]
>
> He also was interested in what the community's desires are:
>
> Well, do I understand that the black community, so to speak, desires that some schools, and I want to be correct on this, remain as black schools? For example, South Oak Cliff?[99]

Taylor was also sensitive to the perceptions of parents:

> I brought this up, this business of massive busing because I know that individual parents or individual families, if you talk about busing the children of that particular family, to that family that is massive busing.[100]

And in his concluding remarks he touched again on the issue of busing:

> Now, let me talk just a minute about busing. You know the Federal Courts did not invent busing. That may come as a shock to a great many of you. Kids were being bused to school before Brown. That was a device to get the pupils to school. Now, it came into use as a means, as a desegregation tool, to put an ethnic minority in another school, or an ethnic majority in another school, ...
> Now, also, of course, you know me, I like to call it transportation. I wouldn't call it busing...
> One of the guidelines to the Board was that there would not be massive busing and it does not provide for massive busing, cross-town massive busing, simply to mix bodies. (discussing his order)[101]

Throughout the trial, Taylor commented on the unusual nature of the lawsuit:

> It is unique. I think it's appropriate to say that this is a unique lawsuit, this is not the run-of-the-mill lawsuit that we have in Court.
>
> (Plaintiffs' attorney) I assume that the Court would not like to try one of these every week, nor would the lawyers.
>
> I believe not, thank you.[102]

Taylor said that he realized that it was not possible in this sort of case to make everyone perfectly happy. "I would that it could be otherwise."[103]

This same reluctance to be involved in this sort of suit is evident in his discussion of the issue of whether the implementation of the plan should be monitored, particularly the television plan. Taylor asked the school district attorney whether he had some objection to there being monitors; the attorney replied that he did. Taylor commented:

> I was glad to get the point on it, Mr. Whitham, because that's why I was asking. I say frankly, I doubt that anyone would disagree with me that nobody wants out of the school business any more than I do...
>
> ......
>
> Well, you see this is a desegregation suit, and as I say, I know the Federal Courts, and the Federal Judges want out of the school business, they want to see it operate. But in many instances there has been a Court retaining jurisdiction for a period of time... So, it's not a proposition of trying to run the school board, but the Courts under the ruling as to the maintenance of desegregated or unitary school systems.
>
> Well, I sure don't want you coming back here every month, either. But I see the point there, of course, and it is unique and it is innovative...[104]

In his concluding remarks he commented on white flight:

> What I hope to accomplish, at least one thing I hope to accomplish in this order is the discouraging and making unnecessary this useless, fruitless, inane and cowardly "white flight."[105]

On the television plan for the elementary grades, Taylor later commented in an interview that he thought that it had a lot of merit; he saw it "as a gentle introduction into living together." He admitted that many people saw the TV plan as a gimick, however.[106]

Before Taylor handed down his order, some preparations were being made in the community for its implementation. The Dallas Community Relations Commission set up four task forces to work with various parts of the

Dallas community to help bring about peaceful implementation of Taylor's plan.[106] The members of the school board also met to discuss plans for the implementation of the plan that Taylor was about to hand down.[108] About this time Superintendent Estes commented to the press on the plans that were before the judge. He expressed concern over the cost of busing and said that the plaintiffs' plan would be the "death knell blow to quality education in this ciry."[109]

On August 2, Judge Taylor handed down his order for the desegregation of the Dallas schools. Taylor's plan, like the school board's, retained neighborhood elementary schools, adopted the television integration plan in the elementary schools, and accepted the school board's satellite zones for pairing schools with a few additional satellites which add more minorities to predominantly white high and junior high schools. Taylor essentially adopted the school board's plan for junior and senior high schools except for the pairing of a number of schools in the Oak Cliff section of the city. Unlike the school board's plan, however, Taylor's plan would have left no secondary schools 90 percent or greater black and only one secondary school 90 percent white.[110]

Taylor had these comments concerning the elementary school portion of his order:

> Now, the elementary plan, this may come as a great shock to many of you, this order preserved the neighborhood school concept as far as the elementary schools are concerned, and adopts the Board's plan of television as a tool of desegregation. Now, let me make a slight correction there. The Board's plan, TV plan, is not adopted exactly as the Board proposed it. The Court has written an order in connection therewith. It is onerous, but again, I think that Dallas must take the lead in the use of this great tool, and I think, I know it's an educational tool, and I am firmly convinced of the Constitutionality of its use as a tool of desegregation.[111]

Taylor's order also expanded the membership of the tri-ethnic committee to 15 members -- five of each race -- and ordered the committee to supervise the implementation of the plan by the school district; desegregate staff and faculty to achieve a 75 percent white and 25 percent minority ratio at each school; and reassign about 20,000 secondary students to schools other than those they attended in 1970-71. The television plan was modified so that students would receive a minimum of one hour of daily televised contact, and a face-to-face contact at least once a week.[112]

Less than three hours later plaintiffs' attorneys filed a motion to appeal Taylor's order.[113] The school board, on the other hand, met immediately after the order was announced and voted unanimously to implement the plan. The opening of school was delayed from August 24 to September 7. Superintendent Estes said of the plan: "The court has, in the main, adopted the plan of the board of education and it is economically plausible, administratively feasible and educationally sound." The board members did not, however, say that they definitely would not appeal the order.[114]

Reaction to the Order

Initial reaction to the plan was somewhat mixed but for the most part positive. Mayor Wes Wise said that the "plan appears to be fair." School Board President John Plath Green said, "We must put education as our primary object in the process. The judge ordered us and we, as a district, are going to carry out those orders for the good of our children." A number of other civic leaders encouraged the community to comply with the plan.[115]

When asked how the black community would react to the plan, tri-ethnic committee member Zan Holmes commented that he was sure that it would be mixed. He said that the plan appears to be a sort of compromise in that it contained some things that the white community wanted and some things that the black community wanted. Another black spokesperson suggested that blacks might react negatively to the fact that more than 10 times the number of black children would be bused as white children.[116]

Less than two days after Taylor made his ruling, two of the members of the school board, Eugene Smith and Tom Williams, announced that they would ask the board to appeal the ruling citing a deluge of calls which they had received from parents living in the Oak Cliff section of the city which was to receive many of the black students bused under the plan. Angry parents charged that their schools had been "raped to appease North and East Dallas."[117] As a result of this pressure, at a school board meeting attended by more than 1,000 parents, the board voted unanimously to appeal that portion of Taylor's order which required the busing of 15,000 junior and senior high school students. Board members did, however, go ahead with plans to implement the order pending the appeal.[118]

Simultaneously, a group of ten parents from the Oak Cliff section of Dallas filed suit in federal court to halt the plan by asking the court to enjoin the school district from implementing it. The suit asked Judge Taylor to award damages to the parents and other parents in the same section of the city "for dimunition in the fair market value of their property and home sites."[119]

And Mayor Wise said that he and two Oak Cliff City Councilmen would meet with the tri-ethnic committee members in an effort to obtain an audience with the judge or get the committee members to convey their feelings to the judge and get him to change the order. Wise also stated that he was opposed to the massive busing of students.[120]

The following day Superintendent Estes said that it was doubtful that buses would be available in time to transport students for the opening of school September 7. He said that the unavailability of buses would be one reason to seek a stay in the implementation of the court's order, but at first he would not disclose whether he favored a stay. Later he said that in view of mounting public pressure for a more feasible solution than busing, he strongly favored an appeal to the Supreme Court to "save Dallas." "Our major problem is not desegregation, but resegregation. The decision in Dallas is crucial to every major city in the nation. If Dallas can't save itself, then no other city can."[121]

One of the white members of the tri-ethnic committee announced that he would ask the entire committee to seek a stay of Taylor's order. "The recent court decision is the most disastrous thing that has happened to Dallas in many a day," the committee member told the more than 1,000 parents gathered at a meeting of Concerned Citizens for Neighborhood Schools.[122]

Finally, and unexpectedly, on Friday of that week, Taylor telephoned from out of the city to tell the school board that he was staying that portion of his order calling for the busing of 15,000 students. He made the following statement to the news media in announcing the stay:

> While I am away from the hue and cry for a couple of days, I have come to the conclusion that those parts of this court's order of August 2, 1971, that ordered the satelliting of students from the inner city to the high schools in the northern part of the district and the "pairing" or "grouping" of the secondary schools in the Oak Cliff area which require the transportation of students from one school to another, should be stayed until January 10, 1972.
>
> It is my opinion that the effectiveness of the other tools for desegregation provided for in the August 2 order should first be determined -- that is, desegregation of faculty, majority-to-

> minority transfer rule, the tri-ethnic committee with its enlarged powers and influence -- that those should all be tried before resorting to the expensive and disruptive tools of pairing and satelliting.
>
> The majority-to-minority transfer rule giving students, both black and white, the incentive of a 4-day school week could well produce the ethnic balance in schools that demonstrate a unitary system. The school board's Confluence of Cultures Program, guaranteed grade level performance, and other parts of that great undertaking could bring about an equal quality education for all students, which is the primary aim of everyone of us.[123]

Despite Taylor's stay of the busing of secondary school students, the school district decided to go ahead with its plans to appeal certain parts of his order. In its motion, the school district challenged the four day school week offered as an incentive for students who used the majority-to-minority transfer plan, the busing of secondary school students, and the pairing of schools and zoning of blacks into white school zones. Superintendent Estes stated that the district's appeal was not sparked by public outcry from Oak Cliff residents. "The plan is educationally unsound and does not make good use of our building space."[124]

A week after Taylor's order was handed down, attorneys for the plaintiffs motioned the judge for a stay of the part of the plan that required the use of television hook-ups for elementary school desegregation, their rationale being that the money for the television equipment should not be spent pending resolution of their appeal to the Fifth Circuit. Taylor denied their motion, saying, "It's something new that needs to be done in these large metropolitan areas, so I'm going to deny this stay."[125]

Three weeks later, the Court of Appeals granted plaintiffs' motion for a stay, ordering the school district not to spend any funds purchasing equipment or hiring people to plan the television system. Estes, once again sensing the direction that the wind was blowing commented, "It would be ill-advised to spend staff time and money developing a program that may not be upheld."[126]

Estes' ability to adapt to changes in public opinion and court orders did him no harm with the school board, which came quickly to his defense when a resident of the Oak Cliff section of the city attacked him as the architect of the plan ordered by the court during a school board meeting. Members of the board as a group referred to Estes as the best superintendent in the country.[127]

Shortly after announcing the stay of the busing of the secondary students, a hearing was held at which time Taylor explained that he still expected the board to reassign some students to schools throughout the city in order to achieve a unitary system. He told the school district that he expected some students to be satellited from their original schools to schools in other parts of the city in order to achieve better racial balance.[128]

In response to this order the school board drew up a plan that involved the busing of 7,000 black students from their schools to predominantly white schools in North and East Dallas. During the vote on this plan, the board's lone black cast the only dissenting vote, commenting that it was one-way busing of blacks as usual. "I think it's unfair," said Dr. Conrad.[129]

Taylor responded to the board's proposal by ordering a few minor changes, one involving the alteration of a boundary line so that black students would be moved from an overcrowded elementary school to a predominantly white school, and another requiring the assignment of all of the black and Mexican-American students from a school that was to be closed to the

Skyline Center for Career Development.[130]

Plaintiffs motioned Taylor to clarify his order with respect to the majority-to-minority transfer rule to permit Mexican-American students to transfer if they, together with blacks in a school, constituted a majority. Taylor denied this motion in response to a request from the school board attorney, though he stated that he would ask his tri-ethnic committee to review this decision before the spring semester.[131]

In his final opinion filed on August 16, Judge Taylor defended the television aspect of the elementary school plan, saying "The Court is convinced that it is far more than a 'part-time' desegregation plan." He stated his reasons for thinking that "some new approach and solution to this problem must be found." "In attempting to pattern a remedy for the DISD situation this court has sought not only to achieve an equal, integrated, quality education for all students, but has been conscious of the necessity of the stabilization of the private residential patterns in the district."[132]

While final changes were being made in the desegregation plan, school board vice-president Eugene Smith was making preparations to present a proposal to the rest of the board to the effect that Dallas lead a nationwide campaign to obtain a constitutional amendment preserving the neighborhood school and the autonomy of local school boards. He said that he was proposing the constitutional amendment because school districts were being used to effect sociological changes rather than educate children.[133] Later that month the school board voted 4 to 3 in favor of a resolution offered by Smith that called for the Dallas school board to ask the Texas School Board Association to petition the National School Board Association to:

"Support a constitutional amendment providing for quality education with compensatory education for all educationally disadvantaged and preservation of the neighborhood school." The resolution also concluded that "the educational, social and emotional needs of children are being disregarded in order to provide sociological change within school districts."[134]

In voting on the resolution, the board members split along party lines. Members of League for Educational Advancement in Dallas (LEAD) Conrad, Dan Foster, and Bromberg voted against the resolution. Smith, Harry Tunstall, James Jennings, and Board president Green, all backed by the Committee for Good Schools (COG), favored the resolution. Board members Marvin Berkeley and Tom Williams were absent from the meeting.[135]

Despite the passage of this resolution, after Taylor entered his final order, the school board began to move in the direction of implementing that order. Superintendent Estes and a number of the members of the board called for a "mobilization of the moderates" to nullify the effects of the extremists who they described as "playing to the emotions of the people." In asking the board to approve a campaign to encourage students to take advantage of the majority-to-minority transfer plan, Estes said, "We've been silent and now it's time for the board to assert its leadership."[136]

The Board's apparent good will was short-lived, however, for less than three days later the board unanimously voted to ask Taylor to stay the busing of the 7,000 black students to schools throughout the city owing to the unavailability of buses. Estes told the members of the board that his staff had exhausted all means of securing buses and that the Dallas Transit System board of directors rejected the school district's plea to reroute 90 buses now used to bus students to their neighborhood schools. During the public meeting, several of the board members attempted to assure the public that their action was not footdragging. "We cannot offer an educationally sound program this fall unless we have this stay. We've moved in good faith to implement the court order and this is the first time we've been back to the court on our own motion," said board member Green.[137]

Plaintiffs' attorneys responded to the school board motion for a stay saying, "to wait until the last minute to 'discover' a shortage of buses is a clear indication of either bad faith or incredibly inept administrative practices."[138]

Meanwhile the City Council, meeting three weeks earlier had decided to intervene in the suit only in the event that Taylor altered his stay of the secondary students imposed in early August. The Council directed the city attorney to file a motion in the court requesting intervenor status in the case, but explaining that the city would only become a party for the defendant if there was some change in the stay order.[139]

When the school board motioned for a stay of the busing of the black students because of the alleged unavailability of buses, Taylor granted the city's motion to intervene so that the Dallas Transit System (DTS) officials could be brought into the suit. When the director of DTS, whom the plaintiffs had subpoenaed, failed to appear in court because of illness, Taylor appeared to be annoyed and asked Superintendent Estes where the school district had expected to get the buses when it filed the plan to bus the black students. Estes responded that they had thought that either state buses or DTS buses would be available.[140]

Later that week, Taylor denied the school district's motion for a stay and ordered them to negotiate with DTS for the provision of buses. "It has not been conclusively shown to me that this order cannot be complied with," said Taylor. "I'm not going to assume that the Dallas Transit System in this city of excellence is not going to cooperate with the school board in meeting its obligations. However, if the crutch of a court order is necessary, I would regretfully enter such an order," he said.[141]

After a short period of negotiations, the school district and transit system officials reached agreement over a plan that would bus approximately 6,000 students, mostly black, on a staggered schedule. Some of the students would miss the first class in the morning or the afternoon, but Estes said that efforts would be made to see that these were not academic classes and he said that these students would not be segregated into special groups. The city attorney requested that Taylor require the city-owned transit system to provide the buses to the school district under court order.[142]

Taylor agreed to comply with the request, and after chastising the school district and transit officials for not preparing a plan earlier, he said of the plan: "Let's try it."[143]

All parties were not particularly happy with the settlement, however. One school board member, complaining that the students who were to be bused were being punished because some of them would miss class periods, said that he favored an appeal of the plan to a higher court. Plaintiffs' attorneys also complained of the fact that the black students who were to be bused would bear the burden of desegregation. They also claimed that they "were not informed by the court, by the school board's lawyers or by the city attorney's office" of the meeting where city and school officials submitted a bus schedule to the judge. They were apparently notified only an hour before Taylor signed the order requiring the city to provide buses.[144]

As the new busing plan was being developed and implemented, several school board members were becoming increasingly disturbed by the role that the tri-ethnic committee was coming to play. "The tri-ethnic committee is making policy, and it bothers me. If this practice continues, with the judge ordering what the committee suggests, then we have a 'super' school board and a federal superintendent that some board members have feared," said school board vice president James Jennings. On the basis of recommendations by the tri-ethnic committee, Taylor ordered a number of changes, including allowing students who had been assigned to Skyline High School from a predominantly black technical school to attend another school in the vicinity of their old school, and permitting Mexican-American students to take advantage of the majority-to-minority transfer program if they made up more than 8 percent of the students at a school.[145]

Committee chairman Zan Holmes responded to Jenning's concerns by stating that the committee had discussed its recommendations with Estes before presenting them to Judge Taylor, but he admitted that there was a communication problem with the board.[146]

Dr. Conrad commented that he did not feel the blacks that were on the judge's tri-ethnic committee were very representative of the entire Dallas black community.[147] Concurring, Martinez said that most of the blacks on the committee were fairly moderate black ministers who were connected with downtown interests. Of the committee itself, Martinez said that it was not a very cohesive group; he said that the blacks and the chicanos mostly fought with the whites on the committee.[148]

The board may have had some of its own communication problems with the public. As one newspaper report pointed out, during the course of the trial, the board met repeatedly in private, although this was a somewhat questionable practice legally in light of Texas's open-meeting laws. The board was able to get around this difficulty by claiming that these meetings were held for the purpose of discussing legal matters related to the suit, which are exempted from the open-meeting requirement. Nevertheless, as one school board member confessed, they often discussed other matters in these meetings that were not confidential in nature. As a result, some citizens complained that one of the board's biggest problems was that it never had an open meeting to discuss its desegregation plans.[149]

While the latest busing plan was in the process of being implemented, the school district was beginning to explore some alternatives to busing. In early September, Superintendent Estes unveiled a plan for five "super high schools" or magnet schools to be located in different areas of the city. Estes said that during earlier negotiations with the plaintiffs in Taylor's office he had presented the idea of these magnet schools as a way of demonstrating the district's good faith. On the basis of Estes' recommendations, the school board agreed to spend $10,000 over the following three months to study the idea of magnet schools.[150]

The first day of classes under the new desegregation plan was mostly peaceful, but attendance at Dallas schools was down by almost 14,000 students from school officials' predicted attendance level of 153,000, based on the previous year's attendance level.[151] During the first several days of the new school year less than one-sixth of the 650 white students who were scheduled to be bused to black schools attended classes. Black parents and students appeared at a meeting of the school board to express their disapproval with the lack of support shown by the white students. Superintendent Estes responded by predicting that enrollment would rise to 151,000 by the end of the week and said that the school district would begin to determine why unenrolled children were not in school.[152]

By the end of the first two weeks of classes enrollment had risen by 17,000 students to 156,000, and secondary school enrollment was down only about 500 students from the previous year. Elementary school enrollment was down by more than 4,500 students, however. Moreover, because white secondary school students continued to decline to attend the black schools to which they had been assigned, four of these black high schools continued to be more than 90 percent black. On the basis of these figures, school officials admitted that the desegregation of these predominantly black schools had failed.[153]

Meanwhile, plaintiffs' attorneys were having problems of their own. Edward Cloutman and Doug Larson, who had handled the case as attorneys with the Dallas Legal Services Project, had recently left the Project to enter private practice. They filed a motion in early September specifying themselves and five other attorneys as preferred counsel for the plaintiffs. But shortly thereafter the current director of the legal services project filed a motion asking Judge Taylor to settle the question of who represented the plaintiffs in the suit, whether any of the attorneys were to receive fees, and of what status was the class.[154] Larson had requested payment of $11,000 in fees for the time he spent representing the plaintiffs after he left the legal services project.[155]

In ruling on these motions, Taylor denied payment of fees to Larson saying that he did not think that it would be appropriate for someone to start out as a public attorney, and then when he gets out into private practice, ask for fees. Taylor also split the representation of the plaintiffs, permitting Cloutman and Larson to continue to represent the original 21 plaintiffs, but assigning responsibility for the representation of the class to the Dallas Legal Services Project attorneys after Cloutman and Larson had sought to retain the right to represent the plaintiffs after going into private practice.[156]

Later, in mid-October, the school board, in preparation for a national conference sponsored by the board to explore alternatives to busing, began to consider various proposals for desegregating the Dallas schools. The school district hired Westinghouse Learning Corporation to develop a set of alternative approaches. Among the proposals presented to the board was one which would eliminate the city's regular high schools and replace them with five integrated magnet high schools. School board members hoped that the national conference would provide them with ideas that could be developed in time to be presented to the Fifth Circuit or the Supreme Court as alternatives to the plan ordered by Judge Taylor.[157]

In January 1972, Taylor made permanent his early August stay of the extensive busing of secondary students. Despite the fact that the majority-to-minority transfer program had by that time fallen far short of the rate of transfer needed to desegregate most schools throughout the district, Taylor made the stay permanent, apparently, according to obser-vwrs, to keep the schools running smoothly in the expectation that the appeals court would hand down a decision on the appeal later that month.[158]

Appeals Court Decision

While the decision of the appeals court was pending in the school desegregation case, the Dallas school district was involved in another suit in which federal district court Judge Sarah Hughes ordered the district to eliminate "institutional racism," a phrase that she adopted from Superintendent Estes who had testified that the school system was guilty of racism. The suit had been brought by a black student who was suspended from the district's schools. The school district was ordered by Judge Hughes to draw up a plan of administrative changes to eliminate the alleged racist discipline policies.[159]

According to Rene Martinez, the first Chicano member of Taylor's tri-ethnic committee, the Dallas School system had the highest rate of student suspensions in the nation.[160] By March of 1975, according to Estes' informal count, black student suspensions were down 40% from their previous level as a result of the affirmative action program adopted by the school board in response to the court's order.[161]

During the period of time during which the court of appeals decision was pending the ethnic composition of the Dallas schools changed significantly. During the 1971-72 school year the ethnic composition of the district's schools was 37% black, 10% Mexican-American, and 54% Anglo. For the 1974-75 school year the figures were 43%, 12%, and 45%, respectively.[162]

Despite the fact that the hearing on the appeal of the suit was held in December of 1971, the Appeals Court did not hand down their ruling until July 23, 1975. No explanation was offered by the Circuit Court for the delay which had proved to be a considerable frustration to the parties in the case. In September of 1974, the plaintiffs had requested the Appeals Court to make their decision in the case. Their plea having little effect, they filed, in June of 1975, for an en banc hearing in an attempt to force a ruling in the case.[163]

The Fifth Circuit's ruling, when it finally appeared, stated that the plan that Taylor had approved to desegregate the Dallas schools was "inadequate" and ordered Taylor to draw up a new plan.[164] The opinion itself did not mention "busing," but in a footnote the circuit court stated that

> "We believe that the DISD has sufficient financial resources to comply with this directive. School buses, although not presently owned by the DISD in sufficient numbers to carry out meaningful desegregation, can be leased or purchased with the funds which, but for our decision, would have been used to implement the district court's elementary 'television plan'." 517 F.2d 110

Of the television plan the court said,

> "The district court's elementary school 'television plan' may not be justified because of the Supreme Court's realization that some one-race schools may remain in a school system which has become unitary in character. The 'television plan' does not attempt to alter the racial characteristics of the DISD's elementary schools. The plan, although novel in approach, is incompatible with all the jurisprudence of the past twenty years as to public school desegregation, and hence fails to pass muster."[165]

Taylor was ordered to file with the Appeals Court by October 15 a detailed progress report so that the court could determine whether further action would be required in order to insure that the Dallas schools would be desegregated by the middle of the 1975-76 school year.[166]

When asked by reporters after the decision was announced whether he would order busing, Taylor responded, "I'm just numb, don't ask me that." He said that alternatives would involve "redrawing some lines" but "that wouldn't take care of some schools." He also said that whatever solution he chose would not be influenced by political trends against busing, popular opinion, or emotionalism. "The courts cannot make a ruling on the basis of what's in the news, we got to make decisions on the basis of the evidence and the law."[167]

Martinez reported that shortly after the Fifth Circuit handed down their ruling in July of 1975, Taylor met for breakfast with a group of representatives from the Chicano community in Dallas. He said that Taylor changed and grew a great deal over the course of the suit; initially, the judge referred to the Chicanos as "latins," but he gradually became more sensitive to them.[168]

The school board met shortly after the appeals court decision was handed down and voted 6 to 3 to seek a stay of the ruling and to appeal the ruling itself to the Supreme Court. The vote of the board split along ethnic lines with the 6 white members of the board voting in favor of the appeal and the 3 minority members, Conrad and Kathlyn Gilliam, both blacks, and Robert Medrano, a Chicano, opposing the appeal. Announcing the decision of the board to appeal, board president Bill Hunter said that the board's decision was the "result of a sincere interest in preserving the integrity of the neighborhood school concept for effective education of all students with minimum disruption of the educational process." Conrad commented to reporters that the majority of the members of the board had run for election as advocates of the neighborhood school, but Hunter denied that the vote was aimed at satisfying any particular political constituency. However, another member of the board, Nancy Judy, confirmed that fear of considerably more busing was a motive in the board's decision.[169]

Despite the board's decision to appeal the circuit court's order, they also decided to initiate work on a new desegregation plan, being aware that if a stay were not granted that they would need to proceed immediately with the preparation of a plan. Superintendent Estes was directed by the board to explore a number of alternatives in preparing a plan, ranging from preserving the neighborhood school concept to "transportation." Hunter commented to reporters that it was apparent that the circuit court believed that the only way to provide for quality education was to "move people." He suggested that compensatory education could be used as an alternative to busing.[170]

The following month Kathlyn Gilliam telegraphed Judge Powell who had been petitioned for the stay, protesting the use of her name on the petition to the Supreme Court in spite of her instructions to school district attorneys to note that the board was divided on the appeal.[171]

On August 23, in a simple one word ruling, Powell denied the school district's request for a stay of the Fifth Circuit's order. Board president Hunter announced that the denial of the stay would have no effect on the school district's plans since they would take whatever action necessary to comply with the ruling in effect.[172]

Immediately after the appeals court's decision was announced Taylor met with the attorneys for the school district, Warren Whitham and Mark Martin, and the plaintiffs' attorneys, Ed Cloutman and Sylvia Demarest, to discuss the best way to proceed in complying with the new order. Taylor had earlier commented to reporters that the appeals court "apparently wants a court record made."[173] Demarest and Cloutman suggested that the court appoint an expert to help draw up school assignments for students, perhaps even using the City of Dallas Planning Department to help out under the direction of a court appointed expert. Taylor reacted negatively to this suggestion, saying, "I did that before and the news media and everybody else jumped all over the TEDTAC."[174]

Various elements of the Dallas community also responded quickly to the appeals court ruling. A coalition of black organizations met shortly after the ruling was announced to develop a plan of action for the black community concerning the court's ruling. The coalition included representatives from Oak Cliff and South Dallas NAACP, Urban League, Black Chamber of Commerce, Afro-American Advisory Committee to the Dallas school district, and other black parent and community groups. The group's central position was to push for a revitalization of the inner-city schools and to oppose one-way busing.[175]

Another group of Dallas residents, the Citizens For Neighborhood Schools, formed in 1971, announced that it would hold a rally and use "every political and judicial avenue open" to oppose any forced busing in Dallas. Leaders of the group also said that they would present a resolution to the city council asking the council to oppose forced busing.[176]

Meanwhile, members of the city council were reacting to the appeals court ruling. Mayor Wes Wise said that he was not convinced that busing would lead to a mass exodus of white families to the suburbs. Councilwoman Rose Renfroe took steps to introduce a resolution to the council that would urge Congress to adopt a constitutional amendment against forced busing. Mayor pro tem George Allen planned to introduce a resolution calling for the council to pledge to uphold the laws of the land and maintain peace and harmony in the community.[177]

Becoming concerned over the intensifying debate by the council over the opposing busing resolutions, the mayor warned that Dallas could be heading down the same path as other cities such as Boston that had not handled the issue of school desegregation and busing peacefully.[178]

The following month, the Renfroe resolution was tabled by an eight to three vote of the council, despite the presence of a crowd of over 75 people who appeared at the council meeting to support the resolution. Earlier that day a group of civic leaders from the Dallas Alliance, including Jack Lowe, Zan Holmes, Charles Cullum, Rene Martinez, David Fox, and Randy Ratcliff, appeared before the council to ask them not to take a stand on the resolution. Lowe explained the group's position: "We're not here to advocate a particular plan. We're here to ask you to help develop a certain climate that whatever the school board and the courts decide, we're going to get behind it and try to make it work.[179]

Earlier that month the council asked the city manager and the city attorney to study the question of the possible consolidation of the Dallas school district with some or all of the 17 other school districts in the county. The council members who supported this study said that they wanted the issue looked at because they were concerned about the impact that the migration of families out of the city as a result of massive busing might have on the tax base of the school district and the quality of its services. Little further interest was displayed by the council in the issue of consolidation as the proposed study was never discussed in subsequent newspaper reports.[180]

The Formulation of Plans

As the school district began to devise a new desegregation plan while its motion for a stay of the appeals court order was pending, Judge Taylor instructed the tri-ethnic committee that its main function would be to provide information and advice to the school district and the plaintiffs in helping to formulate their plans. He did not specify in greater detail what he expected of the committee except to say that he might call on them to be a witness in court concerning any plan that was developed.[181]

Despite the efforts of the black coalition to pull black opinion and action together concerning the issue of the desegregation of the city's schools, the diversity of groups and interests in Dallas' black population threatened to pull the group apart. According to newspaper reports black ministers, who for a long period of time had been the dominant black group in the city with respect to the issue of desegregation, tended to take more of a back seat at this stage owing to the pressure of different interests on the subject.[182]

On August 1, H. Rhett James, president of one of the three local branches of the NAACP, announced that the organization would seek to intervene in the school desegregation suit, stating that they would "do all we can to see that the best possible plan for the desegregation of the Dallas school system is adopted." He said that the group decided to intervene so as to prevent "extremist groups" from dominating any desegregation plan drawn up by the court, but declined to identify the extremist groups to which he was referring.[183]

In a move to take the lead in the black community and act as an "umbrella" organization, the local NAACP mailed questionnaires to 153 black organizations throughout Dallas polling them on issues relating to blacks and the city's schools. Brice Cunningham, leading the legal team for the NAACP's intervention into the suit, planned to present the results of the poll to Judge Taylor in a hearing in September.[184]

Taylor permitted the intervention of the NAACP and a group of Pleasant Grove and Oak Cliff parents in the suit saying that though there might be some concern that the inclusion of the groups in the suit would delay the formulation of a plan, "the fact that it might take more time does not particularly worry me. I think that we should take the time to attempt to do justice."[185]

Although the issue of the possible inclusion of some of the suburban school districts had been raised on appeal to the Fifth Circuit in 1971, the question was not closed because the appeals court, while ruling that suburban consolidation was not warranted, importantly stated that this decision was made on the basis of the record before the court--a record which contained no testimony concerning the question of consolidation. On the basis of this judicial caveat, the plaintiffs decided to request the inclusion of seven suburban school districts in the Dallas suit: Carrollton-Farmers Branch, Duncanville, DeSoto, Highland Park, Irving, Lancaster, and Wilmer-Hutchins. They alleged that the seven school districts had in the past operated racially segregated schools and that they transferred students to the Dallas schools to continue the operation of racially segregated schools.[186]

Taylor ruled that the suburban districts could be included in the suit, but denied school district attorney Whitham's request to let the Dallas school district halt its work on a Dallas-only plan in light of the inclusion of the suburban districts. Taylor said that the Dallas district's request was premature.[187]

The reactions of the suburban school district officials varied from little comment, to defense of their policies, to expression of the conviction that the Fifth Circuit had closed the door on the issue of consolidation in their ruling.[188]

When the school board met to begin discussions concerning a new desegregation plan, they reported that their initial progress on the broad outlines of a plan was rapid but denied reports that specific details of the plan had been decided.[189] Board president Hunter told reporters that one thing that the board wanted to make clear to the community was that given the nature of residential patterns in the city and a number of other factors, any student assignment plan developed by the board would require more student transportation than then existed and that the burden of transportation would fall on all groups.[190]

At a meeting in early September, the Dallas Alliance voted to urge the participants in the suit to reach a compromise solution, and local citizens to accept whatever was handed down by the court. They also decided to convene a meeting a few weeks later to ask community leaders for their support of "moderation" in the suit. There was support for a more active role on the part of the Alliance; one member said "Let's get out of the court and come up with an agreement instead of having one imposed on us."[191]

About a week later, board president Hunter announced that he and the school district's attorneys would meet secretly later that day in an attempt to work out a compromise in the suit.[192] When interviewed, Hunter would neither confirm nor deny that such a meeting had taken place, but the plaintiffs' attorneys both confirmed the occurrence of the meeting.[193] According to Cloutman, the meeting was initiated by Taylor, who, though he did not attend, called the parties to encourage them to meet.[194] Rene Martinez said that he, Walter Humann, and Randy Ratcliff, all members of the Dallas Alliance, went to the parties to attempt to get the negotiations started.[195]. According to newspaper accounts, Hunter came under pressure from an unidentified "third party" (possibly some members of the Dallas Alliance) to hold the meeting with the other parties in the suit.

Among those present at the meeting were Walter Human, of Hunt Oil Company, Randy Ratcliff, Rene Martinez, Hunter, Whitham, Conrad or Gilliam, Medrano, Cloutman, Demarest, and Estes.[196] According to newspaper reports, additional board members may have been present at the meeting as well. Whitham was unwilling to discuss what transpired at the meeting, but Cloutman and Demarest both commented freely. They said that they were willing to negotiate initially, but that the major stumbling block was whether one-race schools would be eliminated under a compromise plan. When it became clear that this would not happen, the plaintiffs' attorneys decided to withdraw from the negotiations. Another factor that they cited in their decision to withdraw was that their clients withdrew permission for them to negotiate once the meetings were reported on in the press.[197]

Hunter, despite his unwillingness to confirm or deny the occurrence of the meetings, said that the meetings broke down because the plaintiffs' attorneys were unable to lay out specifically what they wanted.[197] Reportedly, some members of the school board were upset that the meeting was to take place.[199]

The school board had continued to meet while these negotiations were taking place, thinking that they might not be successful and that they would still be responsible for presenting a plan to Taylor. On September 10, the board voted 5 to 4 in favor of a plan which would leave 52 already integrated schools untouched, mix races at 73, but would do nothing to desegregate 46 minority schools in the south and west of the city. The plan called for the busing of 6,000 whites, 10,000 blacks, and 2,000 Mexican-Americans; the closing of a number of schools throughout the city, and the creation of a number of "magnet" schools.[200]

Board president Hunter, who joined with Conrad, Gilliam, and Medrano in opposing the plan, said that the board's rationale in leaving so many one-race schools was that there were not enough white students to desegregate all the city's schools without massive cross-town busing.[201] Hunter stated that he voted against the plan because he favored another plan that would "better contribute to public stability." School board sources told reporters that Hunter did not feel that the plan would pass court scrutiny. Some of the board members who voted in favor of the plan said that they did not particularly like it because busing was required but that there was no way to get around some transportation of students. Board members Charles Fletcher and Glyn Strother were particularly opposed to the busing of students but felt compelled to vote for the plan in order to comply with the court's order.[202]

The minority members of the board said that they voted against the plan because they did not believe that the plan could be acceptable to the courts owing to the large number of one-race schools that it retained. They also pointed out that minority students would bear the primary burden of desegregation under the plan. Mexican-American board member Robert Medrano charged that the reason why the majority of the board passed the plan was that they feared that if whites had been bused into the primarily white west area of the city, whites would have left the area, it would have gradually become more minority in population, and the incumbent members of the board from that area would have possibly lost their seats.[203]

The same day that the school district's plan was submitted to the court, the NAACP filed its own plan which involved the retention of already integrated schools, the pairing and busing of students to achieve racial balance in all of the district's schools, and a number of innovative programs, including magnet schools, designed to improve the quality of education for minority students. The amount of busing that the plan would involve was not stated in the group's proposal.[204]

Reacting to the school board's plan, a number of city council members said that they doubted that the courts would find the large number of one-race schools acceptable. Mayor Wise said, "I'm against busing per se, but I think we must do whatever the courts finally say."[205] Citizen reaction at this point consisted primarily of questions about what impact the plan would have on their children. Mexican-American parents were concerned that the plan would adversely affect the district's bilingual education program.[206]

Later that week a group of about 200 Mexican-American students rallied to protest the closing of a primarily Mexican-American school because they felt that the school closing would split their community. Another group of Mexican-Americans, led by Rene Martinez, held a press conference to announce that they had presented a position paper to Judge Taylor outlining their recommendations for a desegregation plan, including the expansion of bilingual education programs and the hiring of more Mexican-American teachers. Martinez referred to parts of the board's plan as "horrible," but said that he had little doubt that the Mexican-American community would be treated fairly by the court. "We have great confidence in Judge Taylor. He has always had great sensitivity towards the plight of the Chicano, and we are sure that any order that he makes will incorporate our recommendations."[209]

Speaking for the local chapters of the NAACP, Reverend James Rhett said that the school district's plan was "an affront to the integrity of the court and the intelligence of the community. The crux of the matter is quality education. Busing is incidental -- it's only a tool to achieve racial balance. Blacks are not interested in being bused to white inferior schools, and I don't think that whites are interested in being bused to black inferior schools. If we don't revitalize Dallas, then we don't need any school system here. What is so tragic about the DISD plan is that the board bent over backwards to appease a racist position."[208]

Six days after the school board submitted their plan to the court, Taylor rejected the proposal as "patently not constitutionally adequate."[209] (p. 84) (Page numbers in parenthesis refer to the transcript of the September 16 hearing which has been included in part in the Appendix.) Taylor continued:

> And even if this Court should approve, which it doesn't, I have no doubt that the Fifth Court (sic) would send it -- would promptly send it black, and I don't know that I would want to read their sharp language.
> Now, it's unnecessary to list other deficiencies but most important to me is the fact that it fails to address itself to providing a quality education for the children.
> Now, the plan submitted by the intervenor NAACP, while it suggests some relevant and meritorious provisions, goes too far in the other direction and it therefore is unacceptable. (85)

Taylor announced that he was appointing Dr. John A. Finger, from Rhode Island College, to act as a court appointed expert. (86) He then said, "I want to say first that this is not my job and mine alone. We all have a job to do." (86) He said that he was not insensitive to the feelings of parents regarding "so called busing or forced busing," but added that there was no opposition to busing so long as the buses were used as tools of segregation. He continued:

> Now, there will be busing of students in the Dallas Independent School District simply because it's the law and we must all follow the law. My basic and primary concern, however, is what lies at the end of that bus ride for our children.
>
> Now, I know that our young people can and will adjust, it's up to the adults to be as flexible. Now, I repeat that I'm not changing or trying to change anyone's mind about the merits or demerits of busing, but I would wish that the anti-busing advocates would direct their energies and their vocalizing to a positive and constructive end, that is a quality education for our children. (87-88)

Discussing the efforts of the school board, Taylor said:

> As Dr. Conrad said...the School District missed a golden opportunity. Now, had the District carried through, our problems at this time might well be significantly simpler. Now, I'll add this, I'm not inclined to fault the School District entirely. I say that the business leaders of Dallas have defaulted. I know that because in the beginning when this case was starting and was going on and as it had been pending I have had occasion to call upon some of these leaders and they have left the District to meet the problem alone and unaided and this has to be the height of short-sightedness. (89)

He went on to call on the business community to take part in desegregation efforts in the city:

> When one thinks of the institutions of higher learning, the colleges and universities, the business establishments in this area, the banks, the insurance companies, IBM, Texas Instruments, Blue Cross-Blue Shield, Collins Radio, Xerox, the airlines, just to mention a few, that could be called upon to assist in the educational effort, one realizes that the possibilities for not just quality education but for a superior education in the Dallas Independent School District are simply unlimited and the children are entitled to it.
>
> It's time for the business leaders to stand up and be counted and I'm glad to see that some of them have and there are some that are deeply interested. Dallas Alliance, for example, just to name one group and not with any view of excluding the others that are interested. (90-91)

Finally, Taylor said that he wanted the attorneys for the plaintiffs, for the school district, for the intervenors, and the court's expert to "go into executive session in an attempt to come up with an agreed plan to be submitted to the court, one that will minimize busing so far as possible but in all events will provide a quality education for the students." "The courts encourage settlement because we know that the attorneys and we have good ones in this case and their experts can come up with a more acceptable solution than the court can working alone." (91-92)

Stating that desegregation "affects a great many people...and the court is concerned with trying to reconcile and take into account all of those interests and considerations" Taylor permitted the intervention of a group of east Dallas parents in the suit. (59-60)

School board reaction to Taylor's ruling generally split along the lines of the vote over the plan. Board members who had supported the proposal were disappointed at the court's rejection, particularly in such a seemingly short time period. Conrad said that he had expected the judge's decision but that he was not exuberant because he felt that the school district had lost its chance. Robert Medrano said that he had to commend school district attorney Whitham who apparently had told the board that they would find themselves with a court-appointed expert drawing up a desegregation plan if they did not present an adequate one.[210] Charles Fletcher was quoted in the newspaper as saying, "This is really one more step toward socialism...We had one revolution because of this crap."[211]

NAACP spokesperson Rhett said that Taylor's ruling was "a great justice to the judiciary in branding the school board plan as blatantly unconstitutional". He also said that he anticipated that the NAACP plan might be rejected as well because it "bused everybody."[212]

Chamber of Commerce Board president Russell Perry announced a few days later that he had met with Judge Taylor immediately after the judge made his comments about the lack of involvement of the business community in desegregation efforts. He said that he was "personally hurt" by the judge's criticism of the business community but said that he would support any desegregation plan ordered by the court 100 percent even if that plan included busing. He also said that if it had been up to him his meeting with Taylor would have remained confidential but that the judge encouraged him to meet with the press.[213]

Shortly after Taylor's ruling against the school district's plan, the plaintiffs submitted their own desegregation proposal. Their suggestion was to divide the Dallas school district into a number of subdistricts which if properly designed would reduce the need for cross-town busing of students to achieve racial balance. They proposed that the pairing of non-contiguous areas of the school district should be used only as a last resort, but that the court should not hesitate to employ this desegregation tool if it should be necessary to achieve desegregation in each school.[214]

During the last week in September, Taylor removed Dr. Finger from his position as the court's expert in the case when he discovered that shortly before he had appointed Finger, the Rhode Island professor had travelled to Dallas to consult with the plaintiffs' attorneys. He explained that he would quickly seek another expert and that his action was not to be taken as a reflection on the "outstanding qualifications" of Dr. Finger, but simply that he did not want the impartiality of the court placed in question.[215] Later that week, Taylor appointed Dr. Josiah Hall, a retired University of Miami professor of educational administration, as the new court expert.[216]

During the same hearing at which he appointed Dr. Hall, Taylor approved the plaintiffs attorney's request to delay hearings on whether to consolidate the suburban school districts with the Dallas district because they were unable to gather evidence in time for the planned October 6 hearing. He also said that he would resolve the consolidation issue before ordering the formulation of a new desegregation plan.[217]

After the school district was a few weeks into the new school year it became clear that it was losing students; attendance was dropping, especially at the predominantly white schools in the northeast and northwest areas of the city. Estes commented that the district did not really know where these students were going but expressed "considerable concern" over the desegregation case and its impact on student enrollment.[218]

Despite the drop in enrollment in the school district, the student transfer program was having its second biggest year since the 1971 ruling placed the program in operation. The number of students transferring to schools in which their race was in the minority was up to 1,124 from 836 the previous year. School district officials could not explain the increase in transfers but said that as in past years the vast majority of students using the program were black; only 13 white students transferred to minority schools.[219]

In mid-October, Taylor denied plaintiffs' request that the school board make public all the desegregation plans that had been discussed by the board since the Fifth Circuit's July 23 ruling. The school board attorneys in arguing that the discussions should not be made public cited a recent Supreme Court decision in April of 1975 that held that "frank discussions of legal and policy matters in writing might be inhibited if the discussions were made public and the decisions and policies formulated would be poorer as a result.[220]

Taylor, in his report to the appeals court on October 15, said that he could continue to push for the adoption of a desegregation plan by January of 1976 but that he would delay implementation of the plan until August. The appeals court had instructed Taylor to institute a desegregation plan by the beginning of the second semester of the current school year. In making his case for delaying implementation of any desegregation plan, the judge cited the Equal Educational Opportunity Act of 1974 which prohibited mid-year implementation of a desegregation plan calling for busing; he also said that mid-year implementation would be disruptive to the educational process to a degree that would be "disadtrous." On that basis he said that he would delay implementation of any plan until August "unless hereafter directed otherwise by the court of appeals." In his report Taylor stated, "In our haste to bring this matter to conclusion, we should not forget the impact of an ill-prepared and hastily-implemented plan on the children who are our primary concern."[221]

Plaintiffs said that they were "surprised" by the delay but that they would have to look into the matter before they could decide whether they would oppose it.[222]

On October 23, Taylor granted plaintiffs' request that one of the suburban school districts, Wilmer-Hutchins, be dropped from the case; they offered no reason for their request.[223] And five days later they asked that five more of the suburban districts, now all of the suburban districts in the suit except for Highland Park which is located in the middle of the city of Dallas, be dropped from the suit. Again, the plaintiffs attorneys refused to comment on their request, which was granted by Judge Taylor. Officials from some of the suburban districts that were excused from the suit speculated that the plaintiffs had been unable to gather sufficient evidence against these school districts to make a case for racial segregation in their schools.[224] Taylor also granted plaintiffs request for an additional delay of any further hearings in the suit until December 1; the judge said that having been a practicing attorney once himself he could understand the need for an extension.[225]

During this same period, Superintendent Estes and school board president Hunter made a decision to resign their membership from the Dallas Alliance which was beginning to make plans to develop a desegregation proposal. They said that there was no feeling of ill will but simply that they felt that they would be in conflict given their respective positions in the school district and on the school board. Alliance member Rene Martinez said that the members of the Alliance understood Estes' and Hunter's position and they would hold their spots on the board for them to return after the litigation was over.[226]

On the second day of hearings on the issue of the consolidation of the Highland Park school district with Dallas, Taylor offered to disqualify himself from further hearings in the school desegregation suit if the parties felt that the fact that he had attended and graduated from Highland Park High School and that he currently resided there would bias his judgment in the case. After informing the parties of the fact that he had received a telegram from a private citizen expressing some concern over his connections with Highland Park,[227] Taylor said:

> Now, the parties, though perhaps advised, maybe not fully as to the present residence or anything of that kind, have not raised the point, but all of you know how emotional these cases are and as far as I'm concerned I do not wish any grumbling or reflection on the Federal Courts on anything of this kind and I would be perfectly happy--I haven't found anybody who's volunteering to take my place in hearing and deciding this case, but I want to give the parties, the lawyers on all sides, plaintiffs, defendents, intervenors time

> to reflect on this, knowing my feeling about the fact that I don't want any reflection on the Federal Courts. I think they should confer with their clients and I'll be perfectly happy to call Judge Brown of the Fifth Circuit and ask him to bring another judge in here from entirely outside, not only of the Northern District of Texas but perhaps from outside the State of Texas, who wouldn't be affected by what some people think I might be affected by.[228]

Whereupon, he recessed the hearing until the following day to give the attorneys an opportunity to confer with their clients.

The following day the attorneys unanimously expressed their full confidence in Taylor and the hope that he would not disqualify himself. Taylor said that he realized that the action that he took on the preceeding day was somewhat unusual but that he would have recused himself without consultation with the attorneys if he had felt that he entertained any bias on the basis of his background or for any other reason.[225]

The hearings on Highland Park came quickly to a close and three days later Taylor ruled that on the basis of the evidence offered, Highland Park school district had little if any effect on the segregation of the Dallas school district. While admitting that Highland Park operated a dual school system prior to 1958, Taylor said that he found no significant effect on Dallas and could therefore not include the Highland Park Schools in a Dallas desegregation plan. The attorney for Highland Park had argued that the evidence that plaintiffs attorneys presented regarding the effort of the Highland Park city government to maintain the virtually all-white enclave was "remote in time" and that the city's schools were now operated in accordance with the law and that transfer in and out of Highland Park schools has little effect on segregation in Dallas.[230]

Citing Milliken,[231] Taylor stated that the evidence that was presented by plaintiffs attorneys was not sufficient to meet the Supreme Court's test in that case of "substantial cause" and "significant effect."[232]

Plaintiffs attorneys had no immediate plans to appeal the district judge's ruling.[233] Ultimately, they did appeal, and Taylor's ruling was affirmed by the Fifth Circuit.

School board members generally reacted with comments that they were glad that this portion of the suit was resolved and that progress could be made on Dallas itself.[234]

The Alliance Becomes Involved

On December 15, Taylor sent word to all the parties involved in the case that he wanted to meet with them on the 18th of the month.[235] At this hearing, Taylor endorsed the efforts of the Dallas Alliance to develop a desegregation plan. (The entire transcript of the hearing is reproduced in the Appendix.) He began his remarks by stating that the courts cannot allow basic constitutional rights to be sacrificed to community opposition, and that he was bound to follow the law.[236] He reiterated his concern for "what lies at the end of the bus ride for our children."[237]

He then went on to say that the response of the business community to his earlier call for involvement had been tremendous. The Dallas Alliance, which had been formed earlier that year, had authorized a task force to study the desegregation issue and attempt to develop a plan for presentation to the court.[238] Taylor's intention in calling the hearing was to let the parties in the suit know that he supported the Alliance's efforts. "I want input from this task force and I wanted you to know that they had my blessing and had gotten the go ahead signal from me...And so that you would know that this Court's not going to--again, repeating--operate in a vacuum, but I want to hear from the citizens, I want everybody to know that they have access to the Courts."[239]

Taylor had Jack Lowe, a member of the Alliance speak to the assembled group about the goals of the task force. Lowe said that the task force had agreed on a set of objectives which were to (1) provide the best educational opportunity for each child, (2) eliminate all vestiges of a dual system, (3) assure adequate accountability, (4) enable the entire school system to become a superior system which would attract families, and (5) develop a continuing program that will contribute to a quality school system and community.[240] He said that they did not necessarily consider themselves as representative of all the citizens of Dallas, but as interested and concerned citizens who wanted to work as enablers rather than adversaries.[241]

Taylor told the group that he expected that the members of the Alliance would probably be available to the various parties in the case for questions and so forth, and finally he said, "I firmly believe that we can do something in Dallas along the lines of superior education and I would like to see it done, so that every kid that goes to school gets that kind--and everyone gets that kind of an education."[242]

The city Chamber of Commerce Publication, "Business Response to Challenges in the Public Schools," outlines the growth of the Dallas Alliance from its inception:

> "The idea of the Dallas Alliance evolved gradually. In 1972, a dozen young Dallas leaders, representing various sectors of the community, appeared before the Dallas Citizens' Council. The Council represented 200 major corporation executives in the metropolitan area.
>
> Their presentation suggested a study of the city's major urban problems and the creation of a public system of problem solving. After examining the complex, interrelated needs of the citizens of Dallas, the Council agreed that this type of system was a valid project. A 12-member task force was appointed to verify the Council's conclusions and to formulate specific recommendations.

> Endorsed by the executive committees of the sponsoring organizations, the Citizens' Council and the Greater Dallas Planning Council -- the idea came to the attention of the Dallas Chamber of Commerce in 1973. The Chamber was asked to develop details for such a mechanism, to serve as a catalyst and to insure successful implementation.
>
> During the same time period, the Chamber's Urban Affairs Department had discussed means to unify community development energy through a systematic approach to planning and involvement of government, education and business in urban problem-solving. From the discussions came a proposal for the Dallas Alliance. The initial thrust for the Alliance was to focus on housing.
>
> The Chamber's Urban Affairs Department molded the two proposals into one unified approach. In June, 1973, the board of directors of the Dallas Chamber were presented with a proposal for the creation of the Dallas Alliance. Within a few weeks, the concept jelied.
>
> In approving the Alliance, the Chamber committed its administrative and budgetary resources, conducted briefings for more than 70 community organizations and proceeded to incorporate suggestions presented by these organizations. More than 200 names were submitted for consideration by the Chamber for the selection of charter trustees.
>
> The board of directors approved a slate of government, business and community leaders to serve as members of the Alliance's board of trustees, acting officers, acting executive director and initial funding in late 1974. The present structure for the Alliance includes total financial backing by the Dallas Chamber of Commerce and the Dallas business community, supporting an $80,000 a year budget. The Alliance is staffed by full-time professionals working as an autonomous group."[243]

The Dallas Alliance was composed of a board of forty trustees of which eleven were black, four were Chicano, one was American-Indian, and the remainder were white. Prior to authorizing the creation of the task force on school desegregation, the Alliance had two other task forces in operation, one on the criminal justice system and the other on Neighborhood Regeneration and Maintenance. According to the testimony of Dr. Paul Geisel, the Executive Director of the Alliance, who was on leave from the University of Texas at Arlington where he was a Professor of Urban Affairs, the Dallas Alliance authorized the Educational Task Force of the Alliance to look at the issue of desegregation.[244]

The formation of the task force came about shortly after Judge Taylor's remarks chastizing the business community on September 16. Initially, a resolution was passed by the Chamber of Commerce endorsing whatever the court would come up with but Martinez and others said that this was simply not enough. A group of interested citizens and business persons including Jack Lowe, Dave Fox, Clayton Clark, a black businessman, Ron White, the president of the Black Chamber of Commerce, Rene Martinez, the Urban Affairs Director for the Dallas Chamber of Commerce and member of the tri-ethnic committee, possibly Walter Human, a Hunt Oil vice president who had helped to get the Alliance itself started earlier that year, and Zan Holmes, the sole black state representative from Dallas, came together as a planning group for the task force. They were a loosely formed committee that had come together to explore the possibility of developing a desegregation plan. Additional members were chosen by the respective ethnic members of the group until the group of people that approached the Dallas Alliance was composed of six blacks, seven Chicanos, and seven whites. This group sought and obtained the approval of the Dallas Alliance as its Educational Task Force and of that group nine people were currently members of the Alliance itself. Subsequently, an American-Indian member was added to the task force.[245]

About the middle of October the task force was assigned the services of Dr. Geisel who travelled throughout the country to meet with approximately thirty people who were involved in educational and desegregation issues.. Dr. Geisel reported to the task force on these meetings which were held on a weekly basis until about the middle of December. On December 16, the task force developed the guidelines that Lowe spoke of at the December 18th hearing and directed Geisel to develop and flesh out

out what the proposals would involve if they formed the basis of a desegregation plan. Geisel, working extensively with personnel from the school district whom he said were very cooperative, prepared a workbook for each of the members of the task force. With the workbooks in hand, the task force began meeting on one and, sometimes, two additional days a week, spending approximately a total of 1,500 hours together.[246]

According to Rene Martinez, it was frustration with the judicial process that lead to the formation of the task force. The feeling was that the majority-to-minority transfer program and the busing of white students had failed, so that the task force decided to explore the program elements of educational program.[247] Throughout the period of time that the task force was meeting, the chairman, Jack Lowe, was in touch with Taylor concerning the progress that the group was making.[248]

The Presentation of Plans

On December 29, the plan that was prepared by Dr. Hall in his capacity as the court's expert was released to the press. In the plan, Hall indicated that if all of Dallas' one-race schools were to be eliminated, some of the city's already-integrated schools must be involved in busing. But in the proposal that Hall developed, the already-integrated schools were left alone and busing was called for for about 23,000 students from 73 of the city's schools. The plan would also have left about 40 predominantly minority schools as a consequence of leaving the already-integrated schools untouched. One of the plan's guidelines was that no student be forced to ride on a bus for more than thirty minutes in one direction. For the most part the plan was quite similar to the school board's plan that was rejected by Judge Taylor.[249]

Many of the persons involved in the case who were contacted for comment on Hall's plan refused to comment, but the few school board members who did agreed on the basis of their own experience that it was unlikely that the plan would be approved by the courts.[250]

The plaintiffs presented two plans to the court, each of which called for more busing than any of the other plans before the court at that point. Plan A which was the more extensive of the two involved the busing of about 55,000 students, would have left no all-black schools in the city, and would have divided the school district into 16 high school zones. Plan B would have created 14 high school zones, called for the busing of about 38,000 students, but would have left 15 all-black schools, mostly in the South Oak Cliff section of the city. Sylvia Demarest said that most of the community people with wnich they had spoken preferred Plan A because it desegregated all the schools, but that Plan B was submitted as well to show that the number of all-black schools could be kept to a minimum. Both plans would have also eliminated the attendance zone for the Skyline Career High School, changing it into a magnet school that could take students from throughout the district and would have required the enhancement of educational programs at schools that were currently predominantly black or Chicano.[251]

In late December, the city council, on a motion offered by councilman John Leedom, directed the city attorney by a 6 to 2 vote to contact Taylor to see if the judge would hear a request to drop the city from the suit. Leedom's reasoning was that it would be more difficult for the court to force the city to get buses for school desegregation if the city were not a party to the suit.[252] Taylor simply told the city attorney to file a motion in court and let the matter be resolved out in the open.[253] After hearing from various members of the community and debating the issue the city council ultimately decided to remain in the suit. The city attorney argued that the city would have little control over the nature of the final solution in the case if it were not a party to the suit. Leedom got only two other votes for his motion.[254]

Shortly before the hearings in the case were about to begin again, there was some dissention among some of the representatives of local NAACP chapters in Dallas. The regional director of the organization, Richard Dockery, was quoted as saying that he would not rule out the possibility of a compromise solution in the case. He was taken to task by James Rhett, president of the John F. Kennedy Branch of the Metropolitan Council of the NAACP, who said that Dockery did not speak for the Dallas branches, intervenors in the case. He said that compromise could not be considered unless they knew what the positions of the various parties were and that, "it would be precipitous to discuss compromise when we haven't gone to court, heard plans, or consulted with our lawyers."[255]

In an interview held shortly before hearings began in the case, Taylor said that despite the fact that a 'tougher', more far-reaching desegregation plan may be ordered than in 1971, at which time disruptions broke out in several schools and parents took their children out of the Dallas schools in the wake of a moderate busing order, he felt that Dallas would react more calmly this time. "At the time of the 1971 order, children were disrupted just a few days before school was scheduled to start. They were upset and didn't know what to do. But those students who went through that period have either graduated or are about to. In the meantime, I hope -- and I believe -- that there has been a mellowing in public attitudes. After all it has been 21 years since the Brown decision. All the children who were in school at that time are out now. In fact, some of today's parents were not even born then. Time changes everything."[256]

The Hearings

During the first day of the hearings on a new desegregation plan, on February 2nd, Superintendent Estes testified that the district would have to order buses and necessary building revisions by March 1st in order to assure their completion by the following August, the date that the court had set for implementation of a new plan. The following day was devoted to testimony concerning the proposal that the school district had presented to the court the previous September. Under questioning, Estes admitted that the number of one-race schools left by the plan might be as high as 55. In response to a question from Taylor, Estes agreed that more than 42,000 students would never attend an integrated school.[257]

During the course of the trial, Taylor repeatedly encouraged the attorneys to get together to see if a compromise could be reached. On one occasion he said:

> I would like for the attorneys to get together and see if there is any ground on which you can reach any solution to this case. And I say that because in most lawsuits a lot of times the lawyers and their clients can come to a better solution than the court can.

He went on to request that the press not disturb them since it would be difficult for them to negotiate except privately.[258]

According to newspaper reports, the plaintiffs and the school district attorneys and officials did meet for about two hours at the end of the first week of the hearing, but they would not comment on what was said at the meeting. Apparently, however, the attorneys were pessimistic that the negotiations would lead to a settlement.[259]

The Alliance Plan

Up to this point in time the Dallas Alliance task force had been unable to reach agreement on a desegregation proposal for presentation to the court. The task force, having received the workbooks prepared by Dr. Geisel with the assistance of the school district personnel, had set about developing a proposal that could be presented to the court. Despite their efforts, they missed the January 12 deadline that Taylor had set for the filing of plans with the court. Jack Lowe, who was the chairman of the group until he became ill in mid-January, said that he had told the group when they had started meeting that they might not be able to come up with a plan. But he said that he was encouraged that they were still meeting after the January 12th deadline had passed. Other members of the group also said that they were encouraged by the fact that the group was still meeting, but conceded that they had moved little beyond the conceptual stages and that there were significant divisions among the members.[260]

When Jack Lowe became ill, Dave Fox took over as the acting chairman of the task force. According to Rene Martinez and Sylvia Demarest, Lowe had acted as a moderate force on the task force, particularly in his expression of balanced views and his willingness to refrain from taking an extreme position on some of the issues. Dave Fox, by contrast, was described as "abrasive" and unable to exert the moderating influence that Lowe had.[261]

After two all-day meetings on February 7 and 8, at which point the hearings on the plans had been in session for a full week, the task force suffered a breakdown in their negotiations that split the group along racial lines.[262] After reaching consensus concerning a large number of issues the group turned to a proposal regarding the assignment of students to grades 9 through 12. On Saturday the 7th the group took a vote on a proposal which called for the assignment of students to the nearest high school and the creation of magnet schools in the core of the city to which any student could transfer on a voluntary basis with the condition that there would be a racial mix at all magnet schools. The proposal also apparently contained the phrase "Neighborhood Schools concept." On the basis of a vote of 9 to 7 in favor of the proposal, acting chairman Fox declared that there was no consensus on the issue and that further discussions should be had. A second vote was taken later that day which was 13 in favor and 3 against the proposal with one abstention. The meeting adjourned shortly thereafter.[263]

On Sunday, after again discussing and agreeing on a number of other proposals, there was further discussion and a vote on an amended version of the magnet schools proposal that was identical with the exception that the phrase "Neighborhood Schools concept" was not included. The vote was 7 in favor, 9 against, with 2 abstentions. Fox reportedly said, "We've lost," and, after some further discussion, called for a 48-hour cooling-off period.[264]

According to a document drafted by the minority members of the task force, the Anglo members caucused immediately after the Sunday meeting broke up and decided that the task force had failed and that no further meetings would be held.[265] Dave Fox was quoted in the paper the next day as saying that no further meetings were planned by the group, and another source said that Sunday's meeting had ended in "utter frustration."[266]

In contrast, the minority members of the group understood Fox's statement of the day before that there qould be a cooling off period to mean that the group would resume negotiations at its regularly scheduled meeting on the following Tuesday. One minority member was quoted in the paper as saying that it was his understanding that they would meet at the usual time and place. The following day the minority members of the task force met to reassess their position on the issues that had been discussed. Rene Martinez told reporters that the disagreement had occurred over student assignments, and that part of the plan was unacceptable to white members of the task force. When interviewed again, Fox said that no further meetings would be held because a very wide gulf existed between white and minority members of the task force that did not appear to be reconcilable.[267]

The minority members of the group appeared at the usual time and place for their meeting on Tuesday night, and as expected, the white members of the task force did not show. The minority members then proceeded to draft a document addressed to the Board of Directors of the Alliance, reconstructing the points concerning which the group had reached agreement and the issues over which the breakdown of the group had occurred as they viewed it. This document was then reproduced in preparation to being handed out to the members of the full Dallas Alliance, the intention being to explain to the Alliance the view of the minority members of the task force that the white members had backed out, so that the Alliance could decide whether to appoint new white members to the task force or make some other decision. Martinez saw this action taken on the part of the minority members as calling the bluff of the white members of the group.[268]

As a result of this pressure, the Alliance board of directors voted unanimously on Wednesday to direct the task force to try again in its attempt to reach agreement concerning a desegregation proposal.[269]

Finally, on February 16, the task force reached agreement by a vote of 19 to 2 on a plan for desegregating the Dallas schools. The Board of Directors of the Dallas Alliance then approved the plan and it was presented to Judge Taylor at 7 pm on the same day. The plan called for the busing of approximately 18,000 students, of whom only about half would be bused specifically to achieve racial balance in schools. In addition, only students in the fourth through the eighth grades would be bused; students in kindergarten through the third grade would attend neighborhood schools, as would secondary school students. High school students would, however, be encouraged to attend a number of magnet schools located in the center of the city. It was hoped by the task force that sufficient numbers of students would be attracted to the magnet schools so as to have them reflect the racial ratios of the ciry.[270]

The Alliance's plan also called for the hiring of minorities into administrative positions in the school district such that the administration of the district would reflect the racial character of the city by the end of a three year period. Other important aspects of the plan were the expansion of bilingual programs from kindergarten through the eighth grade, the establishment of an educational quality assurance system to be provided by an outside auditor, and the funding of older facilities in poorer areas of the city on a priority basis. The failure to bus students at the high school level meant that the plan would leave many predominantly black schools in the South Oak Cliff section of Dallas unchanged.[271]

Two members of the task force declined to support the task force plan. Frank Hernandez, a Mexican-American attorney who served as a member of the tri-ethnic committee, objected to the student assignment portion of the plan, saying that it was wholly inadequate in constitutional terms.[272] James Rutledge objected to the "tremendous" cost of the task force plan and the intrusion of the group into educational policy matters.[273]

Jack Lowe, when describing the Alliance's plan to the press, said that the agreement to give minorities the administrative positions in the district overcame their objections to the lack of busing of secondary school students.[274] Sylvia Demarest said in an interview that the task force had been close to an agreement that would have included busing for students in grades nine through twelve, but that this was immediately before Lowe became ill. This report was unconfirmed by any of the other people involved in the task force. Ron White, one of the task force members and a member of the Black Chamber of Commerce, confirmed the notion of a compromise involving no busing for high school students and the administrative quotas, saying that it was the black members of the group that initially brought up the issue of the need for more minorities in administrative positions within the district.[276]

In testimony taken at the hearing after the task force plan was introduced into evidence, Dr. Geisel denied that trading took place over the issues of busing and administrative quotas, though he did say that the issue of the administrative quotas was introduced into the task force discussions late in their deliberations.[277] Further on in the hearing, however, Mr. Rutledge, another member of the task force, testified that he had no doubt that there was what he called a "trade out" over these issues.[278] Other members of the task force who were interviewed also confirmed the fact that the task force's plan was the result of negotiation and compromise on a number of issued.

As he told the parties about the Alliance's plan after it had been presented to him, Taylor described his conception of the effort that was undertaken by the group:

> Now, (the members of the Alliance) are citizens of this community, they didn't undertake the court's challenge to them I think as one of the parties or one of the litigants in this lawsuit with something to win or something to lose but simply as interested people trying to do something for not only the community but for the kids without undertaking to be critical of the efforts of the Dallas Independent School District.[279]

He reminded the attorneys that he had asked them to meet together in an effort to reach a compromise solution. Then he said:

> What has been accomplished along that line, I do not know. In any event, the filing of this plan by the Task Force may put a new dimension into that settlement discussion or negotiation or whatever we want to call it.
> Now, as I told the parties last Friday, I hadn't been altogether satisfied with what had been presented (in the way of plans to the court).[280]
>
> ....
>
> Now, I want the attorneys to come up and get a copy of the plan. I want you to see whether or not you want to take a look at this plan, consult with your clients, just how you wish to proceed in the light of this new situation, and not with a view to asking you to agree or disagree at this time but simply to take a look at it and see whether you want to proceed with the taking of evidence or time to consult with your clients and consider...your own situation at this time.[281]

At this point the hearings recessed so as to enable the parties to consult with their clients. When the hearings were resumed, Whitham told the judge that the school board was still willing to negotiate but that they preferred to stand by their own plan. Whitham said that a majority of the board had found the Alliance plan unacceptable.[282] The actual vote was 5 to 3 against the plan with Gilliam, Medrano and Hunter voting against the proposal's rejection by the board, according to school board sources.[283] Robert Medrano, concerned about the board's rejection of the plan and the chance that it might not be considered seriously, sent a letter to Judge Taylor outlining what he saw as the proposal's strengths.[284] Taylor told Whitham that he appreciated the efforts of the attorneys and then said:

> And I will repeat that I don't ask the parties to negotiate for my benefit because, though, I sometime have wondered about it, deciding cases is what I hired out for and I will continue.[285]

After some discussion concerning the pros and cons of admitting the task force plan into evidence, Taylor said that he would enter an order giving the task force status as amicus curiae. Whitham had argued against admitting the plan into evidence because he felt that the cross-examination that would be necessitated by such a move would be damaging to the community. His alternative was simply to commend the group for its efforts and attempt to take what they said in their plan into consideration.[286]

The plaintiffs attorneys said that they had no quarrel with the non-student assignment portions of the plan, but the student assignment aspects of the plan were not what "we would urge for the court to adopt. It does not go far enough, particularly in the elementary grades." Brice Cunningham said that the NAACP's position was that "As the student assignment plan stands now, the NAACP cannot adopt it." [287]

In the rush to complete a draft of the task force proposal in order to get it to Taylor, a number of items upon which the group had agreed were eliminated from the plan that was presented to the judge. Several of the members of the group took some time after the plan had been given to the judge to pull together those things, including a program modeled after the California Early Childhood Education program, which had been left out.[288]

After it had been decided that the task force plan would be entered into evidence, Taylor called Dr. Geisel to ask him to appear in court to answer questions about the plan. In his testimony Geisel began by describing the task force and the manner in which they set out to accomplish the development of a desegregation plan. He described the visits that he made to other cities to speak with experts in the field of education and desegregation and the workbook that had been prepared for the members of the task force. At one point Taylor interrupted with a question,

> I am interested in how the task force went about this. Were they interested in talking to people who were skilled in the field of education or skilled in the field of desegregation?[289]

Under questioning from Whitham, Geisel described the nature of the Dallas Alliance and how the task force came to be formed. He also discussed how the group came to reach the final plan that was presented to the judge, but, as stated above, denied that the group had reached a compromise on the basis of a trade of no busing for grades 9 through 12 for administrative quotas. In discussing the personnel aspects of the plan, Geisel said that the administrative quotas were introduced in accordance with what he had observed had taken place in the city of Atlanta in connection with their desegregation suit.[290]

After Geisel's testimony, Taylor again raised the issue of a negotiated solution to the case. He said that he took the initiative of asking the task force to become involved and asking the parties to see if they could come up with a solution. He then asked whether in fact there had been any further consultation between the parties or not. After being assured by Whitham that there had been, Taylor said,

> All right. I don't know whether they have paid any attention to the task force or not. Of course, there is one thing about it, I am not undertaking to pre-judge this case or anything of that kind, but when we get up or get into a matter like the plan that was submitted by the task force, then the parties, immediately, all of them, become antagonistic, just like they are fighting the lawsuit again, just like they are -- in other words, not with a view to doing anything as far as coming up with a satisfactory plan for the school district is concerned (sic). Now, for example, about three times we went over the number of students, the number of one-race schools, that there would be. And of course, the attention is constantly called to the Fifth Circuit opinion in this case, and I have read it a time or two and I know a little bit about it, some of you haven't read but one or two lines out of it, and I would suggest that.
>
> I am also aware, I think you are, I am talking to you attorneys now, of something else that the Fifth Circuit said in Calhoun v. Cook, and they said that after the opinion was handed down on July 23rd in this case, that is, the Atlanta case, said that the aim of the Fourteenth Amendment was the guarantee of equal protection on which this litigation is based is to assure that State supported educational opportunity is afforded, educational opportunity is afforded without regard to race. It is not to acheve ratial (sic) integration in the schools, citing cases. Now that is also before the court and I call that to your attention, you lawyers, in connection with my request to you that you continue to consult as Mr. Whitham has indicated that you have done.[291]

On the following day the issue came up again,

> ...I have wanted the parties throughout this thing to talk and approach this not as though they were somebody that was wanting to win a lawsuit or a big victory at the courthouse.
>
> (Whitham) I can assure you, as a lawyer who has been in a number of settlement negotiations in various complex matters, that aside from the Dallas Alliance this one has been approached. I can't promise you a solution any more than I could if we were trying a damage suit here, Judge. I'm telling you though that it's been done and it's being done.
>
> Well, I'm simply asking whether or not if there is any purpose to be served by further discussion...
>
> (Whitham) The Court should not assume that just because the Dallas Alliance said something in any way that the parties or the lawyers for the parties completely ignore it. If you have that impression it's an erroneous impression.
>
> Well, I almost got that impression yesterday, and I don't hesitate saying so now. Nobody wanted to hear any more about it apparently.

> (Whitham) No, let's don't you labor under that impression. Everything that the lawyers know about desegregation plans or proposals or Court decisions or attitudes of clients is getting hashed over ad infinitum, but I can't tell you any more than that now.
>
> Well, that's fine. I just---
>
> (Whitham) But, if you think that just because the Dallas Alliance proposed something and nobody appeared in court that could support it that it's out here and not ever being mentioned in settlement negotiations, the Court misunderstands.
>
> Well, I'm glad you relieved my mind on that.
>
> (Whitham) I don't mean to be blunt about it, I'm trying to get the idea over.
>
> Well, these are dedicated people who aren't seeking to win or lose, they're trying to do something for this School District--I mean, this community and the kids.
>
> (Whitham) But, this is not to say that people agree with all or parts of anything just because the Dallas Alliance proposed it.
>
> Well, I can understand that of course.
>
> (Martin, also for the school district) So that we won't misunderstand Your Honor, are you suggesting not only continued settlement negotiations, which Mr. Whitham has described as ongoing, but are you suggesting conferences with the Alliance in some way?
>
> Yes, Indeed. The Dallas Alliance hasn't come in here with a lawyer to speak for them. They come from -- well, I think I described it as a cross section.
>
> (Whitham) Judge, I think if I may be allowed to express perhaps this as a personal negotiating problem, the more you get with it the harder it's going to be. We're having enough trouble with just the lawyers for the School district and the Plaintiffs. Now, we've got a rough idea of what the Dallas Alliance proposal is. Please don't impose -- I respectfully suggest you will interfere with our progress if you impose bringing in additional parties. We have been this route before.
>
> You go ahead and --
>
> (Whitham) Can we trade like we're used to trading, like lawyers?
>
> It's all right with me.
>
> (Whitham) Okay.[292]

After a recess, Cloutman addressed the bench,

> (Cloutman) Judge, before I start I want to -- I guess to make it clear in the record that the Plaintiffs and other parties in this lawsuit I think have always tried to proceed and

> particularly of late with the interest of the children first in mind and I hope that the Court doesn't have any other perception of how we're trying. We may not always be successful and we may not agree as to how to do it, but there is a possibility of that even now and I want to be sure the Court didn't feel otherwise about the position of the Plaintiffs in this case.
>
> Well, if my remarks were interpreted as -- are interpreted as a comment to the effect that from the approach that has been made by the attorneys in this case from time to time it appears that we're simply playing a numbers game, then forgive me for saying so if that was not the attitude that the attorneys have taken in this case. So I will, of course -- I know that all of the attorneys in this case have approached it in good faith and in an effort to truly and properly represent their clients. And sometimes in the heat of a controversy of this kind we say things that may be misunderstood or misinterpreted. Let's overlook it.[293]

Cunningham also spoke to the judge about his concerns in the case, expressing the hope that the judge did not think that the NAACP was simply interested in winning or losing. He said, rather, that it was the case that the different parties in the case had different conceptions of what would be best for the school district and the children.[294]

After testimony on the Alliance plan, Superintendent Estes again took the stand to rebut the plan under questioning from school district attorney Whitham. Estes said that the total cost of the plan could go as high as $120 million, but then admitted that that was the maximum possible figure for implementation of the plan.[295]

At one point during the hearings, Taylor pleaded with those people who wanted to tell him what they thought of the various desegregation plans before the court not to write him letters. "I've received thousands, well more like hundreds of letters from people who want to tell the court what to do and how to do it. The courts simply can't operate that way. The way to hear these ideas is through testimony in the courtroom." He advised those citizens interested in making their ideas known to the court to contact one of the attorneys in the case who could in turn

argue or ask the questions in the courtroom.[296]

Another issue that the court had to grapple with was whether certain testimony pertaining to some of the sociological effects of busing should be admitted or not. Sylvia Demarest, one of the attorneys for the plaintiffs, argued that such testimony was irrelevant and a waste of the court's time. Responding to the allegation that opinions on the subject were not settled in the scientific community, Taylor said,

> Well, because experts happen to disagree, I can't see that as a reason why a court ought to exclude the testimony of one expert.[297]

Further on the court said,

> Well, I think it goes to the weight of it. That's often true of matters that are relevant or irrelevant. It may not have any weight whatsoever, that could well be, and the court can exclude it...We're talking about a matter of minutes and I think it's incumbent on the court to let everybody have their day in court and that's what I propose to do. So I'm going to overrule the objection. Now, what weight the court gives to it, that's something else entirely.[298]

At one point during the hearings, Kathlyn Gilliam, a member of the school board, testified about her experiences as a member of the judg's tri-ethnic committee. When she told the group present in the courtroom that the committee had been unsuccessful in monitoring the city's desegregation efforts, and when asked why, she responded: "Because basically the committee had to depend upon information and cooperation of the DISD and the committee was not afforded that courtesy." She also said that the school board had never discussed ways to easy desegregation since she had been elected to it in 1974. Whitham unsuccessfully objected to her testimony on the ground that as an individual she had no right to speak for the board's actions.[299]

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> Well, I think it goes to the weight of it. That's often true of matters that are relevant or irrelevant. It may not have any weight whatsoever, that could well be, and the court can exclude it...We're talking about a matter of minutes and I think it's incumbent on the court to let everybody have their day in court and that's what I propose to do. So I'm going to overrule the objection. Now, what weight the court gives to it, that's something else entirely.[298]

At one point during the hearings, Kathlyn Gilliam, a member of the school board, testified about her experiences as a member of the judg's tri-ethnic committee. When she told the group present in the courtroom that the committee had been unsuccessful in monitoring the city's desegregation efforts, and when asked why, she responded: "Because basically the committee had to depend upon information and cooperation of the DISD and the committee was not afforded that courtesy." She also said that the school board had never discussed ways to easy desegregation since she had been elected to it in 1974. Whitham unsuccessfully objected to her testimony on the ground that as an individual she had no right to speak for the board's actions.[299]

argue or ask the questions in the courtroom.[296]

Another issue that the court had to grapple with was whether certain testimony pertaining to some of the sociological effects of busing should be admitted or not. Sylvia Demarest, one of the attorneys for the plaintiffs, argued that such testimony was irrelevant and a waste of the court's time. Responding to the allegation that opinions on the subject were not settled in the scientific community, Taylor said,

> Well, because experts happen to disagree, I can't see that as a reason why a court ought to exclude the testimony of one expert.[297]

Further on the court said,

> Well, I think it goes to the weight of it. That's often true of matters that are relevant or irrelevant. It may not have any weight whatsoever, that could well be, and the court can exclude it...We're talking about a matter of minutes and I think it's incumbent on the court to let everybody have their day in court and that's what I propose to do. So I'm going to overrule the objection. Now, what weight the court gives to it, that's something else entirely.[298]

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Another witness at the hearings was Dr. Francis Chase, who testified about a study he conducted in 1976 concerning the distribution of resources throughout the school district. His study showed that the distribution of resources was disparate between schools and in wealthy neighborhoods and schools in lower socioeconomic areas. He also found that black and Mexican-American students usually attended school in order buildings and had less adequate educational materials available.[300]

The court also heard testimony from David Armor who was retained by the North Dallas group of intervenors in the case. Armor told the assembled group that the decline in Anglo enrollment that had been proceeding steadily for several years at a rate of 10 percent a year would continue unabated and probably accelerate no matter what desegregation plan was ordered.[301] The North Dallas intervenors also brought to the hearings the director of research for the Memphis school district, who argued that the only way for a desegregation plan to be successful was to assign black students from the inner city to the periphery of the school district. He said that white students bused in Memphis schools simply did not show up for classes.[302]

Repeatedly throughout the hearing, Whitham objected to the court's concerning itself with anything except student assignment matters on the ground that it would take power over schools away from school boards:

> (Whitham)...not being monitored by officers, appointees or the structures of the Federal Courts that ultimately will take from local school authorities local schools and in the end if you want to deal with the phenomenon of white flight, it is the frustration of certain citizens with too much outside control of their school authorities that causes them to throw up their hands perhaps as much as who sits next to somebody in a school room.

Let me ask you this question. Do I understand the burden of your objection to what we might anticipate the Plaintiffs' filed plan is and that the only thing the court should consider is the formulation of elementary and secondary student assignment plans and nothing else?

(Whitham) Yes, sir.

Then would it be your decision under the authorities that we have had occasion to review from the Fifth Circuit over the past ten or fourteen years where school boards have done everything in the world to avoid providing equal education for all students regardless of race, that all of that should be overlooked and that the court should make no attempt to see that equal education as pointed out in the Calhoun v. Cook, the Atlanta case, as being accomplished and just forget about that, just turn it back and say this court has no responsibility except to try to desegregate the schools under the student assignment plan?

(Whitham) Student assignment plan means assigning students to buildings. Student assignment plans do not mean an order that says what curriculum is to be taught in a certain school.

I am not talking about curriculum, I am talking about seeing that the same education is provided for all students, does the court have no responsibility in that connection?

(Whitham) You do have responsibility under the six Green criteria for seeing to that, that is not really at issue[303] here, because we are passed the liability phase...

....

(Whitham)...I repeat, we are now going far afield into a study of instruction in the DISD and if this case is to ever end it will be a long drawn out proceeding if we are to get into what is the best way to teach reading and writing within the DISD.

Well, are you asserting that the Court should have no concern for any evidence whatsoever with reference to the past performance of the DISD?

(Whitham) By past performance if you meant that some student had been deprived of his constitutional rights having been discriminated against that is one thing. Whether or not the school district is very effective in teaching any particular student in the district without regard to race how to read or write or comprehend --

Well, I'm not interested in that particularly. ...The question raised is as to discrimination.

> (Whitham) What we are about to get into is not discrimination, we now have a witness who is going to talk about education in general. ...I share the court's concern as I said on yesterday with education, but we are here to assign pupils to buildings.
>
> You say that's all there is to it?
>
> (Whitham) Yes, sir.
>
> Well, I will overrule the objection.[304]
>
> * * *
>
> (Whitham) Your Honor, on that basis, Defendants object on the grounds and for the reasons given in their objections to evidence on matters other than student assignment plans which was presented to the court by the Defendants at the commencement of these proceedings.
>
> To be consistent, I will overrule the objection. I still think the admission of these matters doesn't mean that the court is going to take over the school district necessarily, but as it may or may not affect the issue before the court, they will be admitted in evidence.[305]

Whereupon Taylor gave Whitham a standing objection to this sort of evidence.

> Well, of course we're in equity. We're concerned with the equitable powers of the court, are we not, in fashioning a remedy for a Constitutional violation?
>
> (Whitham) Exactly. But not a remedy for a violation of the 1964 Civil Rights Act.
>
> Well, let me ask you this -- that's a predicate for the next question, which is that the court's powers -- its equitable powers are rather broad in this context, are they not, in fashioning a remedy? ....[306]

On another occasion, Whitham, after quoting from Jack Lowe's comments on December 18 to the effect that the Alliance did not consider itself a "Tri-ethnic Committee" but were simply citizens made the following statement:

> (Whitham) Your Honor, I respectfully submit that all that's before the court is the matter of student assignment and that we have here but one more illustration of a group of citizens, interested citizens, I'm sure, seeking to achieve what they perceive to be the best education to be offered in the DISD. But, I respectfully submit that the Equal Protection Clause of

> the Constitution cannot and should not be used to let each individual citizen or group of citizens within any given school district use a hearing to devise a student assignment plan to impose their concepts and will and judgement of what is proper education upon a duly elected school board. Otherwise the process of government in this country becomes not governed by local school authorities but governed by a judicial system under the guise of the Equal Protection Clause.
>
> Well, of course, I had and will continue to be consistent about that objection and will overrule it. We're going to follow the technical procedures so that the record is clear.
>
> I have consistently been of the opinion and whether I've said it in so many words or not, I don't know, but I will say it now. But I think there are matters before this court other than a simply student assignment plan. Those matters were before -- other matters other than that were before the court in 1971 and I commented before, after the Fifth Circuit handed down its opinion in this case that even though the court had adopted a good part of the school board's plan that was submitted to the court in 1971 it had not carried through on a lot of things that it offered to do in connection with education in Dallas. Now, I have also consistently said and will -- and if it's not proper procedure in a desegregation case, that's unimportant. I think there's a good deal more to a desegregation case than simple student assignment and I adhere to that. I have said on more than one occasion and would repeat it if it's necessary, that I was concerned with the welfare of Dallas. I happen to think a good deal of this city and this community.
>
> I've called on or did call on the business leaders of this city. I have consistently said this is a problem for more people or everybody in this community, not just the court and the court alone. And I have wanted and used the vehicle of the Dallas Alliance which has taken an interest in the matter to get some input from the -- a cross section of our community life. And now what the court will do with it, of course, I expect to hear from the parties through their attorneys. Now, whether the -- the Dallas Alliance hasn't undertaken to appear here through an attorney and because I'm going to consider it and because it is before the court, it will be put in evidence and will go from there. Now, what the ultimate effect is, of course, is subject to the arguments, the presentation and the position of the attorneys. And of course, the court's going to hear from them....[307]

Throughout the trial, Taylor asked witnesses a number of questions, though, for the most part, he simply listened to what they had to say without interrupting them. One question that he addressed to Estes:

> Let me ask this one question: Your experience, Dr. Estes, has been that the tipping point is thirty percent, in other words, if it goes to thirty-one percent --[308]

Further on he questioned Dr. Charles Willie about the use of monitors in Boston:

> You mentioned monitoring, what type of monitoring system has been set up?
>
> Now, were they (the monitors) appointed by the Court?
>
> Did they hear complaints from patrons of the school district?[309]

And then his own expert, Dr. Hall:

> There has been some testimony Dr. Hall, about monitors of the desegregation process and the court's order in connection with it. Do you have any opinion about how that should be accomplished?[310]

Another question tnat Taylor placed to Dr. Hall related to magnet schools:

> I have one other question I wanted to ask, Dr. Hall. What's your view of magnet schools and their impact on desegregation?[311]

Taylor also directed a question at David Armor when he was on the stand:

> Well, then, let me ask this: Have you ever studied whether or not there was any equality of educational opportunity in the different schools after entry of one of these desegregation orders?[312]

Later, he questioned another witness, Dr. Ledson, concerning desegregation in Atlanta:

> Well, then, would you say that the goal or that by desegregation was meant integration of the races?
>
> Then getting back to this question of integration or desegregation of the races. Well now, what did you think about this last opinion of the Fifth Circuit, the Calvin v. Cook (sic) case where they said that the aim of the Fourteenth Amendment guarantee of equal protection on which this litigation is based is to assure that state supported educational opportunity is afforded without regard to race? It is not to achieve racial integration in public schools.
>
> Well, do you feel that in Atlanta you accomplished equal educational opportunity?
>
> With its racial composition now, the school district, can it accomplish this goal that you mentioned, of every school being a magnet school, so to speak?[313]

Toward the very end of the hearing there was some discussion over whether it makes sense to have testimony concerning the impact on each of the plans that has been introduced of suggested changes in the boundaries that are drawn:

> And what effect it's going to have is hard to say. Of course, the Court could start now and draw a whole plan and not pay any attention to anybody; that's one of the problems with this kind of case. As everybody knows I pretty well opened the door to hearing everything within, of course, I am or we are all limited somewhat by the time factor because there has got to be an end somewhere, but I will hear this testimony.[314]

Finally, Taylor commented at the end of the hearing:

> Thank you, attorneysy, ladies and gentlemen, for your very fine arguments. I realize that you're relieved because you have had your say, so to speak. The tumult and the shouting dies. But I rather hate to -- for you to stop, because, after all, the buck stops here. And, of course, I am certainly mindful of the awesome responsibility that is involved in a case of this kind because it certainly affects many, many lives.
>
> In any event, I hope to come forward with an answer rather promptly, in light of the time that we have taken....[315]

Before the hearing was over, Councilwoman Refroe submitted her own desegregation plan to the court. Her proposal involved the use of special high schools modeled after Skyline High which she contended would aid integration efforts because students from throughout Dallas would be interested in attending. She also criticized the Dallas Alliance as unrepresentative of "average people."[316]

Shortly before ruling on the desegregation plans before him, Taylor met with a group of distressed parents in a conference at which he permitted reporters to be present. Originally, he had planned to meet with one black woman and her husband, but a group of parents showed up and he decided to meet with the entire group because they felt that they had not been heard during the five week hearing. The group, representatives of a south Dallas organization, Concerned Parents to Save the

Children, charged that the school district had used the 1971 order in the case to fail to educate black children. They also criticized the Dallas Alliance as not representative of blacks in Oak Cliff or South Dallas. Taylor reportedly told the group, "there is a limit to what the court can do," but also said that despite the fact that it would be difficult to eliminate the vestiges of discrimination in the school system, he was going to try.[317]

Judge Taylor's Decision

On March 10th, Taylor handed down a ruling in the case which adopted the Alliance plan in large measure, but left the details of student assignment to be prepared by the school district by March 24th. He spoke of the plan as h is "best shot" for providing quality education in Dallas, but continued, "I am sure I have left something out. We can't expect to satisfy everyone." In directing the school district to prepare a student assignment plan, Taylor said, however, "there is a great deal more at stake than student assignments, that is, the future and welfare of this city."[318]

He adopted the provision of the task force plan that naturally integrated areas of the city remain untouched by busing. "I am hopeful that this one will work this time. We have had five years of this question being before the people. But there has been a change in the atmosphere in Dallas. I think everybody is kind of tired of worrying about it, including myself," he said.[319]

Under the plan a number of one-race schools would remain in the district; just how many would depend upon the student assignment plan designed by the school district. Taylor said that he was allowing the one-race schools because, "I think there is a new move in the courts for one-race schools," and then he proceeded to quote again from the Fifth Circuit's opinion in Calhoun v. Cook[319A] to the effect that the aim of the Fourteenth Amendment is to see that state supported educational opportunity is afforded to all without regard to race.[320]

In other comments made shortly after his ruling Taylor said that he was impressed by the Dallas Alliance proposal in part because of the people who wrote it. He said that it caught his attention because the members of the task force "did not purport to represent anyone."[321] In discussing how he had decided to formulate the desegregation plan that he chose, Taylor said,

> We had a substantial loss of Anglo students after the 1971 desegregation order. The fact remains that we lost 40,000 white students. That was an important factor in drawing up this plan, deciding which plan would be effective.
>
> There are going to be some who say it is because of the busing in 1971 (that caused the loss of the white students). But if you look at the busing order, it was very moderate.[322]

Taylor went on to discuss the magnet schools:

> I think the most important thing in the desegregation process is the magnet schools. These magnet schools should and will draw students from all ethnic backgrounds.
>
> If people think that overnight you will all of a sudden desegregate the schools with magnet schools, well, that won't happen. But they will help.[323]

The day after Taylor's ruling the Board of directors of the Dallas Alliance voted to support implementation of the judge's order and asked the community to join them. Of the 23 members of the board who were present at the meeting, 22 voted in favor of supporting the desegregation plan.[324]

Other reaction to the judge's order was somewhat mixed. Rene Martinez, one of the Chicano members of the task force, said, "I'm basically pleased. I think the community can be very open to this plan." Dr. Geisel said that he was "relieved" but that the rest of the issue was before the school board. Martinez was particularly pleased at the judge's adoption of the Alliance plan on the issue of the administrative quotas. He was also pleased that Taylor had ordered that bilingual education be provided to all Chicano students who need it.[325]

Plaintiffs attorney, Sylvia Demarest said, "We still don't know what the plan really means." She said that they wouldn't decide on an appeal until they saw the school district's assignments.[326]

Blacks were the least pleased with the order. "We plan to do anything we can to get this plan appealed," said a representative of the black Oak Cliff parents group, United Parents for Quality Education. Dr. Charles Hunter, who drew up the NAACP's plan, said that Taylor's order left too many one-race schools. Cunningham questioned whether the plan, which would leave South Oak Cliff an all-minority subdistrict, could withstand the test of constitutionality. "All of us agree that magnet schools are good, but they're not the only answer," he said. Emerging from a meeting of black leaders who discussed Taylor's plan, Clyde Clark, a black businessman and member of the task force, said that there was no consensus in the group and that they would read the plan further before commenting on other issues. Black community activist Al Lipscomb blasted the plan, saying that the judge "threw the ball away."[327]

Some of the Dallas School Board members indicated their dislike of that part of Taylor's order which would require, following the Alliance proposal, that the top 185 administrative positions in the school district reflect the racial makeup of the city within a three year period. Under the proposal, top administrative positions would be approximately 44 percent Anglo, 44 percent black, and 12 percent Mexican-American. The respective percentages at the time of the order were 76 percent Anglo, 18 percent black, and 6 percent Mexican-American.[328]

About a week after the order was handed down by the court, a coalition of 25 Mexican American groups in the city decided to formally endorse Taylor's plan. One representative of the group said that Mexican-Americans "come out smelling like a rose." Another was quoted as saying that the desegregation plan meant that "we're getting many of the things we've been asking for."[329]

Commenting on the success of the minority groups on the task force to get what they wanted included in the Alliance proposal, Sylvia Demarest said that the Mexican-Americans got quite a bit given their initial position, whereas it appeared that blacks got less than they could have. Rene Martinez attributed the failure of the blacks to get as much as they might have gotten to his own feeling that they didn't always know what they wanted. Ron White, one of the black members of the task force, commented that he felt that the black members of the task force were fairly representative of the black community, but that it was true that the more militant elements of the city were not represented.[330]

Martinez said that while the Chicano members of the task force communicated with the Chicano community, the blacks on the task force were not as effective in keeping the black community and especially the NAACP, who were intervenors in the case, informed about what was taking place in the task force meetings.[331]

After announcing that they supported Taylor's desegregation order, the Dallas Chamber of Commerce informed reporters that several committees would be formed by the Chamber to help the school district plan the development of the magnet schools and to help publicize and provide leadership for the schools. The Chamber also said that it would help raise any additional funding that would be required for the magnet schools.[332]

Concerned about the disclosure of information in a piecemeal fashion, Judge Taylor cautioned the school board about leaking the details of the board's student assignment plan to the press before it was released on March 24th. "What I said was that until they had a final plan, to stop stirring up the community by leaking a partial plan. I do not like the community being stirred up. They (school officials) either ought to stop leaking partial plans, or open up the whole thing to the community like we do in court." Reportedly, Whitham told a meeting of the school board that Taylor was upset over the leaks and that somebody could end up in jail if the leaks did not cease. Taylor later told reporters that he did not intend his concern to be interpreted as a sign that legal action would follow, however.[333]

Reports from inside the school board meetings indicated that a majority consensus had developed among board members that the district could very broadly interpret the guidelines set up by the Alliance and approved by Taylor, such that the school district's plan could differ considerably from the intentions of the Alliance. Sources also said that there appeared to be considerable dissent, particularly from minority board members, over certain provisions and language in a draft of the school district's response to the judge's order. Despite the board's feeling that it could broadly interpret the Alliance's language, Superintendent Estes reportedly told the board that the Alliance had indicated that its doors were open so that the district would have no excuse later to claim that the Alliance's intentions were unclear.[334]

Additional reports confirmed that several members of the Dallas Alliance met with the school board after they learned that of the nearly 16,000 students to be bused by the board only 25 percent would be white.

The Alliance members told the board that the preliminary plan would not fly. As a result the school board, on a 5 to 1 vote, with three abstentions, approved a plan that called for the busing of 2,400 more white students than the preliminary plan. Glyn Strother voted against the plan, and the three minority members of the board abstained, saying that they had not had time to assess the impact of the change.[325]

In another vote several days later, the board decided to ask Taylor to delete all references to educational programs and staffing policies in its final desegregation order. In a 6 to 3 vote, with the minority members of the board dissenting, the board asked that if Taylor decided to retain non-student assignment portions of his plan that he substitute a number of proposals developed by the board for the plan designed by the Alliance task force. The board's proposals would have eliminated the administrative quotas and the early childhood education program that were agreed upon by the task force. After the vote the minority board members said that the board's action was "an insult to the court and a slap in the face to this district's minority parents and their children." Dr. Conrad noted that the board's vote might force a more extensive busing order. "I say if they don't want to change programs then let's bus 55,000 children and be done with it. Then let's see what that does for education."[336] Dr. Conrad said that he was concerned that if the program elements were not written into the court's order schools in the predominantly black areas of the city would loose resources.[337]

About this same time, the plaintiffs submitted their objections to Taylor's March 10 order. In their motion they argued that the findings of the Chase report, which concluded that "there is still a gap between intent to provide equal educational opportunity and the achievement of this goal," were not included in the court order, and if not set out in it, "will leave the appearance that little or no facility disparity exists within the school district, that little or no resource allocation problems exist, and that such disparities occur along racial lines." Plaintiffs asked Taylor to state in his order that the school district has the expertise to correct disparities and that there is no reason for not doing so. They also objected to the court's finding that young children were not mature or competent enough to cope with problems of student transportation.[338]

Another major point that the plaintiffs took issue with was Taylor's statement that the school district had acted in good faith in carrying out the court's earlier 1971 order. "The plaintiffs respectfully submit that to find the DISD has acted in good faith at this juncture, after 21 years of litigation over school desegregation in Dallas, ignores reality and flies in the face of the long history and efforts of resistance engaged in by the DISD." The plaintiffs also requested that Taylor include specific steps for compliance with the administrative quotas that were set out in his order; Taylor had said simply that the school district must be a third of the way toward reaching the goal at the end of each of the following three years.[339]

Concerned that too many students would be assigned to the all-black South Oak Cliff subdistrict under the school board's plan, the Dallas Alliance requested that Taylor include one high school in another subdistrict in the city so that it would not become overcrowded. The Alliance also requested a number of other minor changes in the assignment of elementary schools to the city's subdistricts. Regarding the school district's request that all references to educational programs be deleted from Taylor's final order, Alliance spokesperson Jack Lowe said that they would make no recommendations since they "just didn't think it was (their) place to respond to the school board." Nevertheless, Lowe said that there was no doubt that the task force members still supported the educational programs and staffing policies recommended in their proposal.[340]

The Final Order

On April 7th, Taylor handed down his final order in the school desegregation case, directing the school district to implement a program that would involve the busing of approximately 17,300 students. Taylor's order essentially followed through with his earlier March 10th order by directing the school district to be divided up into six subdistricts and busing only 4th through 8th graders, most of them in three of the subdistricts. Taylor also ordered the school district to comply with the administrative quotas developed by the Alliance and approved in his earlier order.[341]

The district court judge also issued a 5-page supplemental order chastizing the school district for requesting that he delete all references to non-student assignment matters in his final ruling. "The court will not hesitate to say that it taxes the court's patience to have this question raised again after it was raised time and time again during the hearings and after the court specifically adopted the concepts embodied in the Dallas Alliance plan regarding these matters. If the court's response to this objection has not yet registered in the minds of the defendants, it is this: a student assignment plan cannot operate in a vacuum and a unitary school system cannot be achieved solely by mixing bodies." He also warned the school board that he would take any steps necessary to assure equal educational opportunity and reminded them that a Federal court judge in Boston had placed a high school in receivership because of the board's lack of cooperation. Finally, Taylor questioned the board's good faith: "In light of recent actions of the school board which appear to seek the dilution of the expressed intentions of the court regarding equal educational opportunity, one wonders whether the establishment of a unitary school system and the provision of equal educational opportunity is in fact being pursued in good faith."[342]

Taylor's order also required the establishment of four magnet high schools within one year and three more by 1979. A number of magnet and "vanguard" schools were ordered for 4th through 6th grade and 7th and 8th grade students. The order changed in only minor ways the student assignment plan adopted by the board on March 22, but did not comply with the board's request that all non-student assignment portions of the plan be dropped.[343]

On the same day that the final order was announced, Brice Cunningham said that he had been authorized to file an appeal of the order by the NAACP. He cited the maintenance of all black schools in East Oak Cliff as the reason for the appeal, stating that the order was "unconstitutional."[344] The decision to appeal the court's latest order was, however, a decision that split the local chapters of the NAACP in Dallas. Cunningham announced that he had been authorized to file the appeal by the Oak Cliff and the South Dallas branches of the organization. The next day, H. Rhett James, president of the John F. Kennedy Branch, said that his branch had not authorized the appeal and did not intend to be a party to it. Cunningham said that he intended to go through with the appeal. "Two is more than one," he commented.[345]

James said that independent branches are not supposed to operate independently on communitywide issues. Nevertheless, the presidents of the other two branches said that they were planning to meet with the regional director of the NAACP to discuss the issue of national support of the appeal.[346]

Interestingly, the same day, the Black Chamber of Commerce announced that they would endorse Taylor's final order in the desegregation suit. This support, the first since the case began in 1970, was not that surprising, however, since it was announced by two chamber representatives who were active in the Alliance's formulation of a desegregation plan: Clyde Clark, the president of the chamber and a businessman who was a member of the Alliance task force, and Ron White, who served on the chamber's special education task force, was also a member of the Alliance's task force and was later hired by the Alliance to represent their plan on appeal to the Fifth Circuit. Clark and White said that the benefits to be derived from the order in terms of education far outweighed its weaknesses. They cautioned, however, that if the order was not fully executed the school district would find itself back in court.[347]

Moreover, according to newspaper reports, a number of Dallas' prominent blacks became involved in trying to dissuade the NAACP from appealing the court's order. As this was happening, the national organization had decided to support the appeal. Nathaniel Jones announced on April 10th that the national organization would take an active role in the appeal and would help to pay the costs involved. Jones said that the full resources of the national organization would be behind the appeal. "This is a very serious case and a matter of some conscience."[348]

Several Dallas blacks, including Clyde Clark and A. Maceo Smith, a former member of the national board of directors of the NAACP, were scheduled to meet with NAACP officials to get them to hold off on appealing

Taylor's order. They were trying to find ways to keep the organization involved in the case and yet forestall an appeal. Toward that end, Dr. Geisel met with one of Taylor's law clerks to seek an explanation of a clause in the judge's opinion to the effect that the court would retain jurisdiction in the hope that the NAACP would be satisfied with the possibility of annual court hearings at which they could raise complaints about the implementation of the court's order.[349]

Jones responded to these reports by saying, "I don't know what the problem is down there. But that decision has been made. When the decision to appeal has been made here, in this office, that's it."[350]

The school board attempted to decide the issue of whether to appeal the court's order in a confusing series of votes that began on April 14th. On that date, the board voted 5 to 3 (Gilliam was out of town) not to appeal the order. Board members Smith, Fletcher, and Strother voted against that resolution. The resolution also stated that the board would reconsider its position if any of the other parties in the lawsuit appealed.[351]

A week later, after the NAACP's announcement that they would appeal the case to the Fifth Circuit, the school board voted 5 to 3 (Fletcher absent) to file a notice of cross-appeal with the court. The three minority members of the board, Gilliam, Medrano, and Conrad, voted against the cross-appeal. A surprise resolution to withdraw the cross-appeal if the NAACP withdrew its appeal ended in a 4 to 4 tie, with Hunter, Haskins, Judy, and Conrad voting in favor of the resolution, and Gilliam, Medrano, Smith, and Strother voting against it. Medrano and Gilliam both said that the board should vote firmly in favor or against an appeal rather than basing their decision on the action of another party.[352]

Finally, on April 26th, the school board again voted in favor of a cross-appeal, directing its attorneys to defend the desegregation order handed down by Taylor. In a subsequent vote, which passed 6 to 3 (no names) the board qualified the first vote by directing its attorneys to offer alternative arguments promoting the board's own desegregation plan if the court found Taylor's plan unacceptable. In a third vote, the board passed the resolution which had been defeated in a tie vote the week before; they voted to withdraw their appeal in the event that the NAACP withdrew its own appeal. This last vote, however, was somewhat insignificant since the NAACP had by this time held a mass meeting at which it raised several thousand dollars to finance its appeal.[353]

Meanwhile the plaintiffs were involved in their own difficulties over the issue of an appeal. On April 22nd, six of the original plaintiffs in the case, without the knowledge of their attorneys, filed notice in federal court to appeal Taylor's order. Demarest told reporters that she knew nothing of the appeal. "I thought we had talked to all those people and had agreed that unless someone else filed an appeal, we would give this plan a year and see how it worked out."[354]

It was clear, however, that there had not been complete agreement among the plaintiffs as to whether an appeal would be filed. The week before, two of the six persons who ultimately signed the appeal, held a press conference at which time they demanded that Demarest file an appeal or remove herself from the case.[355]

Another of the six who signed the appeal, Ricardo Medrano, brother of the school board member, said that he had gotten some pressure to sign the appeal. "Nothing physical, but pretty close. There were some people putting pressure on me. I might be signing some other paper saying I'm against an appeal."[356]

Five days later, Demarest and Cloutman filed an appeal on behalf of two of the plaintiffs in the case, Sam Tasby and Ricardo Medrano. The decision to appeal was reached after meetings were held after the appeal notice was filed by the group of six plaintiffs. The notice stated in part, "In filing this notice of cross-appeal, Ricardo Medrano hereby withdraws his prior notice of appeal filed on April 22nd."[357]

In its motion for a stay of the district court's order, the NAACP noted a number of points that it found objectionable in the order, including the "confinement of 26,000 students in all-black schools in the proposed East Oak Cliff subdistrict, the failure of the order to establish magnet high schools in the East Oak Cliff subdistrict and establish only one vanguard school, and the 3-year deadline given the district to comply with the administrative quotas and to complete the magnet schools program. By this time the third Dallas branch of the NAACP, the John F. Kennedy Branch, had decided to join in the organization's appeal of Taylor's order.[358]

The motion for a stay of the judge's order was denied by Taylor and subsequently by the Fifth Circuit.

Action taken by school officials after the order was handed down was not without irony. At meetings and on television broadcasts to explain the impact of the school desegregation order, Superintendent Estes praised those very aspects of the order which the school board had fought against consistently over the course of the hearings. Estes said that certain parts of the plan such as the administrative quotas, early childhood education, and bilingual education made the plan "educationally sound, administratively feasible, and financially responsible. I think we owe a debt of gratitutde to Judge Taylor," Estes told a group of business, governmental and religious leaders. School board president Hunter said, "You don't often have the chance to work out the mechanics of the court's concepts. When you look at school districts like Boston and Louisville you realize that if they had had a chance to re-do the plan once they knew what the concepts of the court were things would have been different."[359]

Taylor's Handling of the Suit

In an interview, Taylor spoke of his conception of the situation in Dallas in 1975 immediately prior to the second set of hearings in the case. He said that he realized at that time white flight was a fact -- and that it was necessary to get away from idealism to practicalities like the fact that white flight would have an effect on the tax base of the city along with other adverse effects. "And I didn't want that to happen to Dallas." Taylor said that he thought that people were still uptight about busing but that the time was ripe for something to be done about the situation. "I don't think that what I said in the desegregation plan would have produced change if the time had not been ripe." His attitude was, "Now, this is your problem, what are you going to do about it?"[360]

Taylor said that it was his perception that the school district had little credibility with blacks. "They (the school district) did not cause Oak Cliff (a predominantly black section of Dallas), but they did do some things that caused segregation in the schools."[361]

After he chastized the business community in September of 1975, several business leaders invited him to breakfast. Lowe had called him in 1971 to see what could be done; he called again in 1975. "The response of the business community was almost unbelievable." Taylor said that he was kept informed on the progress of the task force.[362]

On the subject of intervenors, Taylor said that he kept the door open to many people, "I didn't discriminate." "It's better to give people a forum than to slam the door in their face, particularly people who are leery of courts." On the other hand he commented that it is not possible to have an election in the courtroom. But, "It's best to get everything out so that the parties can argue about it." He said that he judges the intervenors by who they are: "who's talking, what's their bias." "You learn what to accept or reject."[363]

ABOUT THE Alliance plan he said, "I was convinced that it was an excellent plan." He said that the primary concern ought to be in kids; "the function of a school district is education." "What's at the end of the bus ride?"[364]

When asked whether the fact that the Alliance plan was a compromise solution reached by a group of people should have any impact on his judgment, i.e., should a judge be bound by such a compromise, Taylor replied that it was presented as a whole plan, and that if he adopted it it would not do justice to pick out things that he simply liked. "What kind of justice is this to reject what the community had put together." He also noted that it really was a compromise, that the ethnic groups had given up something in order to get something. He also said that he realized that it would be impossible to enter an order that would be universally acceptable.[365]

Concerning the appeal of the plan, Taylor said that he had not been confident of the outcome on appeal, but had hoped that it would be left alone; he had hoped that it would not be appealed. It was his impression that the national NAACP put pressure on the local chapters to appeal the ruling, and he feels that the NAACP has a consistent philosophy of mass busing.[366]

Taylor said that he felt that he has to live by the constitution; "that must be the law." But he also said that it was a complex set of problems. They key in his opinion was "to find a solution and adjust it to constitutional acceptance." But he consistently maintained that "moving bodies around fails to guarantee good education." Expressing an awareness of the limitations of his work Taylor commented, "How much can a court order accomplish?"[367]

Taylor expressed the feeling that he was not popular with the news media in Dallas, an ironic statement in view of his willingness to talk with reporters about the case on a number of occasions. It seems that his feeling of not being liked was more of an expression of the attitude of the media toward his orders. He said that he met with representatives of the Times Herald and the Morning News and the papers softened their stances toward him. He said that he was particularly outraged by one editorial by the News that was critical of his handling of the desegregation case.[368]

Sylvia Demarest said that it was her feeling that Taylor never wanted the case -- "he never wanted to make the decision." She said that this was one reason why he delayed the hearing for so long, but that it is also true that many of the delays were requested by the plaintiffs.[369]

The Dallas Chamber of Commerce cites Judge Taylor's efforts to unite the entire Dallas community behind the desegregation plan as a major influence on the business community and its willingness to become involved:

"The business community's efforts were an integral part of the desegregation plan. Even before the actual court order was handed down, the business community was making efforts to insure a united front in support of the plan.

The spirit of Judge Taylor's plan was massive community involvement in the desegregation process. He called for all groups - civic, religious and business - to unite behind the plan.

In a speech before the Volunteer Day honors on May 6, 1977, Judge Taylor talked about the necessity of Dallas "Keeping It Together." This speech outlines the spirit in which the court order was intended:

"Keeping It Together . . . Together"

Honorable William M. Taylor, Jr.
Volunteer Appreciation Day
May 6, 1977

> Every time I get the opportunity to talk about our experiences here in Dallas, I'm reminded of the ten-year-old boy who came home from Sunday school and his mother asked him what he had learned that day. "Well..." said the boy, "our teacher told us about how God sent Moses behind the enemy lines to rescue the Israelites from the Egyptians. He brought them to the Red Sea, and then Moses ordered the engineers to build a pontoon bridge. After they all crossed over, they looked back and saw the Egyptian tanks coming. Quick as a flash, Moses grabbed his walkie-talkie and asked the Air Force to send bombers to blow up the bridge and save the Israelites."
>
> "Bobby!" exclaimed his mother, "Is that really the way the teacher told the story?"
>
> "Well, not exactly," Bobby admitted. "But if I told it her way, you'd never believe it!"
>
> Well, sometimes I think that's the way people from other cities are going to feel when I start telling them about the way this community has rallied in support of the Dallas schools in implementing school desegregation. I just know they're not going to believe it because it hasn't happened this way before in any community I know of in the nation.
>
> From its very beginnings, "The Dallas Plan" has been a plan with a difference. And the difference has centered basically on the amount of community involvement in it...in the planning stages, in the implementation, and because of the first two--in the community support that this city has rallied to give its public schools.
>
> In late 1975 I called together all the litigants in our suit to inform them that I had asked the Dallas Chamber of Commerce's

Alliance Education Task Force to participate in the hearings as a friend of the court. As you know, this multi-ethnic group of citizens had gone out and obtained a private grant to help develop a desegregation plan and had been working for some 4 1/2 months visiting other cities and school districts looking for new and creative ways to not only help desegregate the school system but also to improve the quality of education. Naturally I saw the Alliance Task Force as an ideal vehicle for compromise.

It was my thinking that a group of citizens with a multi-ethnic composition could come up with a plan that would be acceptable to the community as well as the main actors in the suit, and in early 1976, when the Alliance came in with a new concept for desegregating Dallas schools, I accepted it and ordered the school district to work out the details of implementation.

The new plan was much more than a student assignment plan. In effect, it was a total education plan. One which reorganized the school system and placed great emphasis on instructional strategies and community participation.

The key, of course, was to be the commitment and support of the community to help make all of the changes work for the good of the students...and that we have had here. If there is any place in the country today that has lived up to the theme "Keeping It Together, Together," it is certainly the Dallas community...and, you, the volunteers, are the ultimate expression of that togetherness. With a special kind of vision, you and the more than 500 groups who have adopted schools and served unselfishly to assist in the implementation of the Dallas Plan to date -- you have seen that the city, the community, the schools, and, yes, the students, are best served by a strong and dedicated effort to concentrate on the improvement of education, on the positive things to be gained by addressing what can be improved -- and delivering on that.

From the very first day that the Dallas Plan was adopted, the entire citizenry rolled up their sleeves and got busy. The business community came forth to provide top businessmen and other leaders in their fields to advise in the establishment of the magnet schools. The business leadership also got involved in the recruitment of students and now continues its commitment by providing jobs and work experiences for students in each of the career centers. In the same way, churches, synagogues, service clubs and agencies, realtors, area colleges and universities, youth groups and, of course, PTAs and community advisory committees all pooled their vast resources to become tutors, advisors, planners, and most importantly -- the friends of teachers and students in the system. As most of you know, even the staff and administrators in DISD gave a great deal of volunteer time, to assure success in the first historic year of our three-year plan.

> That's why I am particularly pleased to be here today, to add my own thanks and congratulations for your jobs so splendidly well done. I'm fully convinced that the problems of public education cannot be separated from the problems of society in general. If schools are going to succeed, new linkages have to be created with the community. And if the community is going to prosper and grow, its members have to provide the resources necessary to insure quality public education...and that's where you out there really shine. Your personal offerings and support have directly enlarged the partnership of public education and the community of Dallas. It's in your hands that the success of public education rests, and for what you have achieved, I give you my respect and gratitude.
>
> The real challenge is now ahead. You've come through the planning and implementation stages with an outstanding record. But what's been achieved will be for naught if your hard work and commitment doesn't continue. In that respect, I wish you well.
>
> You know, I am a grandfather now. The new generations of tomorrow are developing their standards, their skills, their values that they will carry into the future, right now, right under our noses, every day.
>
> I think that those students who are experiencing the positive and unselfish work of yours will also have something else to take along with them. I think that they, too, will have a vision--and it will be based on their memories of how a large community like Dallas, made up of many smaller communities, of people of every race, creed and background--how this community pulled itself together, to achieve a single important goal, the search for quality and excellence in education for its children.
>
> Perhaps, they too, in the years to come, will be able to "Keep It Together, Together..." I thank you."[370]

After the 1976 Order

Throughout the late spring and into the summer of 1976, the school district and the Dallas business community geared up to prepare the city for the implementation of the district court's plan. In May, 1976, well-known members of the business, civic and religious communities began planning a Community Forum for Education to inform the Dallas community of what the plan entailed. On June 25 presentations were made by educators and business, religious, civic, and minority leaders. More than 500 persons attended the workshop and indicated their support of the Dallas plan.[371]

A Dallas businessman, Jack Miller, responded to the challenge put forth by Superintendent Estes for the business community to help the schools. Among the major actions taken by the business community in the city were: a massive public relations campaign to inform the community, the development of a adopt-a-school program with the goal of having each target school in the district adopted by a business in the area, job training and placement for students in the magnet schools, and loaned executives for the development of the plan. They also pledged their support for the passage of the $80 million bond issue required to finance implementation of the court's orders.[372]

Four magnet schools were opened in the fall of 1976; a transportation institute, a business and management center, a health careers center, and an arts magnet high school. Recruitment efforts for the magnet schools were successful beyond the expectations of those involved; almost 4,000 students were enrolled full-time and part-time in the magnet programs that fall.[373]

In late April of 1978, the Fifth Circuit remanded Taylor's decision back to the district court for reconsideration of the student assignment portion of the order. The appeals court noted that the district court recognized that there may be special considerations involved in devising a school desegregation plan in an urban area with a predominantly minority enrollment that may justify the maintenance of some one-race schools. But the appeals court went on to note that there were no adequate time-and-distance studies in the record in the case to provide a basis for determining whether natural boundaries and traffic considerations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing in the district.

With respect to the non-student assignment portions of the order, the appeals court instructed Taylor that these should be reconsidered in light of the relief that he ultimately orders. They stated, "Because we wish to grant the district court enough latitude on remand to devise a plan that will be workable, we are not binding it to the present non-student-assignment portions of its order." The appeals court also affirmed Taylor's ruling with respect to Highland Park.[374]

Dissatisfied with the appeals court decision to remand the case, in May of 1978 the school district appealed to the Supreme Court. In the spring of 1979 that court granted a hearing and oral arguments were scheduled to be heard in the fall of 1979.

FOOTNOTES

1. 133 FSupp 811 (1955, 233 F2d 796 (1956, 352 US 878 (1956), 146 F Supp 485 (1956), 247 F2d 268 (1957), 250 F2d 690 (1957), 275 F2d 690 (1957), 285 F2d 43 (1960).
2. 342 F Supp 945 (1971).
3. 517 F2d 92 (1975).
4. 423 US 939 (1975).
5. 412 F Supp 1185 (1975), 412 F Supp 1192 (1975).
6. 572 F2d 1010 (1978).
7. Encyclopedia Americana, Volume 5, Americana Corporation, Danbury, Ct., 1978, pp. 438-430; "Dallas, The City" Dallas Chamber of Commerce.
8. Dr. Emmett Conrad.
9. Oppenheimer, E. and Porterfield, B. The Book of Dallas, Doubleday & Company, Inc., Garden City, N.Y. 1976.
10. Conrad, William Hunter
11. Hunter
12. Conrad
13. Dallas Morning News, 7/8/71.
14. Warren Whitham
15. Warren Whitham
16. Hunter
17. Herald, 7/27/75
18. Herald, 7/27/75
19. Herald, 7/27/75
20. Martinez
21. Herald, 7/4/71
22. Herald, 7/4/71
23. Herald, 7/27/75
24. Herald, 7/27/75
25. at p. 659
26. 393 US 97 (1968)

27. at p. 660
28. Herald, 7/4/71
29. at p. 552
30. News 7/3/71
31. Herald, 11/30/75
32. News 2/13/76
33. Judge William Taylor
34. Herald 3/1/70
35. Herald 3/1/70
36. News 10/6/70
37. Dallas Times Herald, 7/9/71
38. News 10/7/70
39. Edward Cloutman
40. News, 10/7/70
41. Warren Whitham
42. News, 11/15/70
43. News, 11/25/70
44. News, 6/19/71
45. News, 6/14/71
46. News, 6/21/71
47. News, 6/27/71
48. News, 6/27/71
49. News, 6/18/71
50. News, 6/29/71
51. News, 6/29/71
52. News, 7/2/71
53. News, 6/28/71
54. News, 6/30/71
55. News, 7/9/71

56. News, 7/3/71

57. News, 7/7/71

58. News, 7/3/71

59. News, 7/7/71

60. News, 7/10/71

61. News, 7/10/71

62. News, 7/1/71

63. News, 7/2/71

64. News, 7/1/71

65. 402 U.S. 1 (1971) Swann v. Charlotte-Mechlenberg Board of Education

66. News, 7/11/71

67. News, 7/13/71

68. News, 7/13/71

69. News, 7/13/71

70. News, 7/13/71

71. News, 7/16/71

72. News, 7/15/71

73. News, 7/16/71

74. News, 7/16/71

75. News, 7/17/71

76. News, 7/17/71

77. News, 7/17/71

78. News, 7/15/71

79. News, 7/18/71

80. News, 7/21/71

81. News, 7/22/71

82. News, 7/23/71

83. News, 7/23/71

84. News, 7/21/71

85. News, 7/23/71

86. News, 7/24/71

87. News, 7/25/71

88. News, 7/26/71

89. News, 7/27/71

90. Trial Transcript, July 12, 1971, Vol. III, p. 665-5

91. Vol. III, p. 729

92. Vol. III, p. 739

93. Vol. III, p. 925

94. Vol. III, 926-7

95. Vol. III, p. 743

96. Vol. III, p. 885

97. Vol. V, p. 1410-11

98. Vol. III, p. 687

99. Vol. V, p. 1381

100. Vol. V, p. 1398

101. Vol. V, p. 1412-13

102. Vol. III, p. 960

103. Vol. V, p. 1407

104. Vol. III, p. 929-30, 932

105. Vol. V, p. 1408

106. Taylor

107. News, 8/1/71

108. News, 8/2/71

109. News, 7/31/71

110. News, 8/3/71

111. Vol. V, p. 1426-7

112. News, 8/3/71

113. News, 8/3/71

114. News, 8/3/71

115. News, 8/3/71

116. News, 8/3/71

117. News, 8/4/71

118. News, 8/5/71

119. News, 8/5/71

120. News, 8/5/71

121. News, 8/6/71

122. News, 8/6/71

123. News, 8/7/71

124. News, 8/7/71

125. News, 8/11/71

126. News, 8/21/71

127. News, 8/25/71

128. News, 8/11/71

129. News, 8/12/71

130. News, 8/13/71

131. News, 8/17/71

132. News, 8/17/71

133. News, 8/12/71

134. Herald, 8/26/71

135. Herald, 8/26/71

136. News, 8/18/71

137. News, 8/28/71

138. News, 8/31/71

139. News, 8/12/71

140. News, 9/1/71

141. News, 9/2/71

142. News, 9/4/71

143. News, 9/4/71

144. News, 9/5/71

145. News, 9/3/71

146. News, 9/3/71

147. Conrad

148. Martinez

149. News, 8/30/71

150. News, 8/29/71

151. News, 9/8/71

152. News, 9/9/71

153. News, 9/17/71

154. News, 9/8/71

155. News, 9/18/71

156. News, 9/18/71

157. News, 10/20/71

158. News, 1/8/71

159. Herald, 3/9/75

160. Martinez

161. Herald, 3/9/75

162. News, 7/29/75

163. News, 7/24/75

164. News, 7/24/75

165. 517 F.2d 104

166. News, 7/24/75

167. News, 7/24/75

168. Martinez

169. News, 7/25/75

170. Herald, 7/25/75

171. News, 8/21/75

172. News, 8/23/75
173. News, 7/24/75
174. Herald, 7/24/75
175. News, 7/24/75
176. News, 7/24/75
177. News, 7/24/75
178. Herald, 8/19/75
179. News, 8/26/75
180. Herald, 7/30/75
181. Herald, 7/28/75
182. News, 9/8/75
183. News, 8/1/75
184. News, 9/8/75
185. News, 8/22/75
186. News, 8/21/75
187. News, 8/22/75
188. News, 8/22/75
189. News, 8/29/75
190. Herald, 8/30/75
191. Herald, 9/2/75
192. Herald, 9/8/75
193. Hunter
194. Cloutman
195. Martinez
196. Demarest
197. Demarest & Cloutman
198. Hunter
199. News, 9/8/75

200. News, 9/10/75

201. News, 9/10/75

202. News, 9/11/75

203. News, 9/11/75

204. News, 9/11/75

205. News, 9/11/75

206. News, 9/11/75

207. News, 9/12/75

208. News, 9/13/75

209. News, 9/17/75

210. News, 9/17/75

211. Herald, 9/17/75

212. News, 9/17/75

213. News, 9/24/75

214. News, 9/23/75

215. News, 9/25/75

216. News, 9/27/75

217. News, 9/27/75

218. News, 10/23/75

219. News, 10/16/75

220. News, 10/15/75

221. News, 10/17/75

222. Herald, 10/17/75

223. News, 10/24/75

224. News, 10/29/75

225. News, 10/31/75

226. News, 11/14/75

227. News, 12/5/75

228. Hearing on Highland Park Motion, December 3, 1975, pp. 244-5

229. Hearing on Highland Park Motion, December 3, 1975, pp. 256-7

230. News, 12/12/75

231. Millikan v. Bradley, 418 US 717 (1974)

232. News, 12/12/75

233. News, 12/12/75

234. News, 12/12/75

235. News, 12/16/75

236. December 18, 1975 hearing transcript, p. 7.

237. December 18, 1975 hearing transcript, p. 8

238. December 18, 1975 hearing transcript, p. 9

239. December 18, 1975 hearing transcript, p. 13

240. December 18, 1975 hearing transcript, p. 14-15

241. December 18, 1975 hearing transcript, p. 17

242. December 18, 1975 hearing transcript, p. 22

243. Dallas Chamber of Commerce, Business Community Response to Challenges in the Public Schools, May 15, 1977, p. 4

244. Trial Transcript, Vol. V, p. 50, 62, 67-68

245. Martinez

246. Trial Transcript, Vol. V, p. 50, 62, 67-68

247. Martinez

248. Martinez

249. News, 12/31/75

250. Herald, 12/30/75

251. News, 1/13/76

252. News, 12/31/75

253. News, 1/1/76

254. News, 1/13/76

255. News, 2/2/76

256. Herald, 7/27/75

377

257. News, 2/4/76
258. Trial Transcript, Vol. II, p. 342
259. Herald, 2/7/76
260. News, 1/15/76
261. Demarest
262. News, 2/8/76, 2/9/76
263. Letter to Directors of Dallas Alliance from minority task force members
264. Letter to Directors of Dallas Alliance from minority task force members
265. Letter to Directors of Dallas Alliance from minority task force members
266. News, 2/9/76
267. News, 2/10/76
268. Martinez
269. News, 2/12/76
270. News, 2/17/76
271. News, 2/17/76
272. News, 2/17/76
273. Letter to Judge Taylor from James Ruttledge
274. News, 2/18/76
275. Demarest
276. White
277. Herald, 2/21/76
278. Trial Transcript, Vol. V, p. 417
279. Trial Transcript, Vol. VI, pp. 87-88
280. Trial Transcript, Vol. IV, p. 291
281. Trial Transcript, Vol. IV, p. 293
282. News, 2/20/76
283. News, 2/19/76
284. News, 2/20/76
285. Trial Transcript, Vol. IV, p. 297

286. Trial Transcript, Vol. IV, pp. 308-318

287. News, 2/20/76

288. News, 2/18/76

289. Trial Transcript, Vol. V, p. 369

290. Trial Transcript, Vol. V, p. 36

291. Trial Transcript, Vol. V, pp. 430-432

292. Trial Transcript, Vol. VI, pp. 90-93

293. Trial Transcript, Vol. VI, p. 94

294. Trial Transcript, Vol. VI, pp. 120-121

295. News, 2/25/76

296. Herald, 2/13/76

297. Trial Transcript, Vol. VII, p. 8

298. Trial Transcript, Vol. VII, pp. 10-11

299. News, 2/5/76

300. News, 2/13/76

301. News, 2/27/76

302. News, 2/28/76

303. Trial Transcript, Vol. I, pp. 29-30

304. Trial Transcript, Vol. I, pp. 442-3

305. Trial Transcript, Vol. II, p. 263

306. Trial Transcript, Vol. II, p. 320

307. Trial Transcript, Vol. V, pp. 18-20

308. Trial Transcript, Vol. I, p. 376

309. Trial Transcript, Vol. III, pp. 181-2

310. Trial Transcript, Vol. IV, p. 282

311. Trial Transcript, Vol. IV, p. 285

312. Trial Transcript, Vol. VII, p. 367

313. Trial Transcript, Vol. VIII, pp. 47-50

314. Trial Transcript, Vol. IX, p. 44

315. Trial Transcript, Vol. X, pp. 159-60
316. News, 2/21/76
317. Herald, 3/10/76
318. Herald, 3/10/76
319. Herald, 3/10/76
319A. 522 F2d 717 (1975)
320. Herald, 3/10/76
321. News, 3/11/76
322. News, 3/11/76
323. News, 3/11/76
324. News, 3/11/76
325. News, 3/11/76
326. News, 3/11/76
327. News, 3/11/76
328. News, 3/11/76
329. Herald, 3/15/76
330. Demarest, Martinez, White
331. Martinez
332. News, 3/21/76
333. Herald, 3/26/76
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336. News, 3/26/76
337. Conrad
338. Herald, 4/1/76
339. Herald, 4/1/76
340. News, 4/1/76
341. News, 4/8/76
342. News, 4/8/76

343. News, 4/8/76

344. News, 4/8/76

345. News, 4/9/76

346. News, 4/9/76

347. News, 4/9/76

348. News, 4/10/76

349. News, 4/13/76

350. News, 4/13/76

351. News, 4/15/76

352. Herald, 4/22/76

353. News, 4/27/76

354. News, 4/23/76

355. News, 4/23/76

356. News, 4/23/76

357. Herald, 4/27/76

358. News, 4/28/76

359. News, 4/9/76

360. Taylor

361. Taylor

362. Taylor

363. Taylor

364. Taylor

365. Taylor

366. Taylor

367. Taylor

368. Taylor

369. Demarest

370. Business Community Response, pp. 6-7

371. Business Community Response, p. 11

372. Business Community Response, p. 12

373. Business Community Response, p. 16

374. Appeals Court Order April 21, 1978, p. 4

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ST. LOUIS

Dorothy Robyn

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I. Background

St. Louis: the City[1]

The St. Louis Arch--a 630-foot stainless steel monument on the western banks of the Mississippi River--symbolizes the City's place in history as the "Gateway to the West." Founded in 1763 by French fur traders, the Gateway City became the last stopping point for the great pioneer migrations west from Ohio, Indiana and Illinois. St. Louis was also the eastern terminus for the Pony Express and the first Transcontinental Railroad.

St. Louis' real population boom came with the start of the California Gold Rush. Between 1850 and 1860, the City's population doubled to 160,773. It doubled again during the next decade, making St. Louis the country's third largest city in 1870.

Many of the families who settled in St. Louis in the mid-1800's were German immigrants who had left the political turmoil of their native states in search of new opportunity in a new land. A large number of Irish settled in St. Louis during those same years, followed by Russian Jews, Italians and Eastern Europeans after 1890. Still, the Germans--many of them Catholic--remained the dominant ethnic group within the City.

St. Louis is a mere 62 square miles in area. The City rebuffed consolidation pleas from 497-square-mile St. Louis County, and instead froze its political boundaries in 1876. The City and the County remain entirely separate in area and jurisdiction, an arrangement which has come to be the City's undoing.

St. Louis reached its population peak of 857,000 in 1950. By 1970, that figure had shrunk to 622,000, a loss of over 200,000 in twenty years. Most of loss was due to migration to St. Louis County, now wealthy by comparison to the impoverished City. During the 1950-70 period, while the City's population declined by over a fourth, the County's more than doubled. (See Appendix A)

Moreover, the population exodus left the City increasingly black and poor. The net out-migration of whites from 1950-1970 amounted to over 400,000, while blacks increased overall by 100,000. A city that was less than a sixth black at the end of World War II was more than forty percent black in 1970. (See Appendix A)

The post-war migration out of the City resulted from a host of factors: widespread ownership of automobiles combined with the development of high-speed expressways, an abundance of flat farmland readily developed for industrial and residential uses, the pull of jobs in the County provided by large manufacturers and business that located there, and, perhaps most important, the incentive provided by the federal government in the form of VA and FHA mortgage loans. Since much of St. Louis was urbanized before 1900, the City had a housing stock that was old and expensive to maintain. The favorable terms of financing new suburban property under VA and FHA guarantees proved irresistable to many City-dwellers.

The increasing number of blacks and poor whites migrating to St. Louis hastened the departure of more affluent whites. These low-income groups required substantial amounts of cheap housing. Lacking that, the demand was met by taking over the hard-to-maintain middle-class structures being vacated by whites. Neighborhoods deteriorated, one by one, further hastening the white exodus, and pushing blacks who could afford to move to shift constantly in search of a better neighborhood.

As the city deteriorated, government officials--faced with a shrinking tax base and an increasing demand for public services--placed a high priority on urban renewal and highway construction in an effort to attract industry. These actions caused substantial dislocation of blacks, further speeding the process of black movement into formerly white neighborhoods, followed often by neighborhood deterioration and abandonment. St. Louis was largely unsuccessful in its efforts to attract private residential development or to reduce overcrowding through public housing. The Pruitt-Igoe housing project, though finally demolished entirely by the government, remains stark evidence of the inadequacy of that solution.

As blacks left the traditional ghetto area downtown, they moved first to the Central West End, and later to the northwest part of the City. Discriminatory housing practices (up until 1962, the St. Louis newspapers had separate listings for "colored" housing), the resistance of certain ethnic groups to blacks, the location of heavy industry and railroads--all of these things directed the movement of blacks. By 1970, the northern half of the City was predominantly black.

South St. Louis remained almost entirely white. The area is heavily German. The yards of the modest bungalows are immaculately kept. Stories have it that the South St. Louis "Dutch" women used to even scrub their porches every day. The residential neighborhoods are ethnic and elderly; the median voting age is 50. An Altenheim (Old Folks Home) still sits on the banks of the Mississippi River. For many years, Mrs. Leonar K. Sullivan represented this area in Congress. Mrs. Sullivan, who "inherited" the seat when her husband died, was the only Congresswoman to vote against the Equal Rights Amendment. She did so for fear that the ERA would overthrow protective legislation for women.

The northern half of the City is represented by Congressman William (Bill) Clay. Clay spent 105 days in jail in 1963 for his participation in a civil rights demonstration, and was one of the first militant blacks elected (in 1968) to Congress. He rejected the traditional, decaying Democratic political machine and put together his own organization.

Despite Clay's popularity, civil rights groups in St. Louis are more accommodating than militant. One observer of St. Louis in the late 1960's offered an explanation for that:

> The St. Louis Negro is Southern in style--polite, acquiescent, and, until recently, knew his place. Furthermore, the city has a second generation Negro elite which exercises its own control over less-advantaged blacks while enjoying a comfortable niche with both the white elite and the politicians. The Negro elite--as well as the white community--has demonstrated that militancy doesn't pay (Doyle, 1969).

The local NAACP is small, without money, and split by a factional dispute. Margaret Bush Wilson, chairman of the national NAACP, is a St. Louis lawyer, but the more conservative faction that opposes Mrs. Wilson controls the local branch. Last June, the branch director for the national NAACP instructed the St. Louis group to send two sets of delegates to the national convention (to be held in St. Louis)--each to serve for half of the five-day convention.

Racial attitudes of whites in St. Louis also reflect Missouri's slave-state background. A 1969 Survey Research Center analysis of attitudes towards blacks found St. Louis among the least liberal of large cities. While on average, 33 percent of white parents in the nation wanted their children to have only white friends, the comparable figure was 50 percent in St. Louis.[2]

St. Louis is experiencing an "urban crisis." The signs of it are everywhere: a high crime rate, serious unemployment, racial inequities, an eroding tax base, increasing costs for providing public services, a soaring rate of building and neighborhood abandonment, and a problematic school system that is over 70 percent black. Affluent county-dwellers decry the deterioration of their "old neighborhood," but increasingly insulate themselves from the plight of the City. Skinker Boulevard, the City-County dividing line, has become something of a "Berlin Wall."

St. Louis: The School System*

The St. Louis school system is fiscally independent of city and state government. The system is governed by a twelve-member board of education, elected for six-year terms at regular elections in odd-numbered years. Voter approval is required of all increases, and in the absence of an increase, the prevailing tax limit must be reaffirmed every two years. A two-thirds majority is also required to pass school bond issues.*

The school board operates independently of city hall. Although the mayor has legal authority to make interim appointments to fill school board vacancies and to appoint independent auditors for the school system, neither of these powers has given the mayor any role in the school system. The mayor exercises no special political role in dealing with the governor or the state legislature. These contacts are made directly by board members and the superintendent.*

Yet fiscal independence has not provided the school system with advantages that allegedly devolve from the system. School expenditures are relatively low, reflecting low teachers' salaries and high pupil-teacher ratios. Capital expenditures are low, primarily because of the difficulty the board has experienced in obtaining the two-thirds majority vote on bond issues. Members of the board are conservative in proposing school tax-rate increases, reflecting the conservatism of the city and the concern of school board members that tax-rate elections may be lost.*

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* Those paragraphs in the following section designated by an asterisk (*) were taken directly from Gittell, M. and Hollander, T., *Six Urban School Districts: A Comparative Study of Institutional Response*, New York: Praeger, 1967. In several cases I have omitted a sentence or two from the paragraph; this is not indicated with an ellipsis.

Public participation and involvement in school affairs is minimal. School board meetings are open to the public but rarely do more than a handful of persons attend a meeting. This is true even when issues of major policy are discussed. The absence of education interest groups and community organizations concerned with education issues is striking. Local Parent-Teacher Associations exist throughout the system but their meetings are poorly attended and deal with unimportant local issues.*

Administrators and Staff. The chief administrator in the St. Louis school system is the superintendent, an appointee of the Board. Robert E. Wentz has been in that position since Fall, 1975. Wentz, who is white, was formerly Superintendent of Schools in Pomona, California. (Wentz was chosen over Ernest Jones, a black, who had been Acting Superintendent several years earlier. Jones is now Deputy Superintendent, and a strong defender of the board's past policies and practices affecting racial segregation.)

The administrative structure of the school system has undergone substantial change in the past decade. Prior to that time, the structure was a horizontal one, with elementary schools separate from secondary schools. In 1970-71, the board established a vertical structure in which a district superintendent became responsible for not only the elementary schools in an area but also the high schools. Each administrative district includes two academic high schools and an approximately equal number of elementary schools which serve to "feed" into the high schools in that particular district.

The school system employs 3,715 teachers. Until recently, teachers were prohibited from having an official bargaining representative. In 1974, teachers were granted the right to a representative, and in turn elected the predominantly black St. Louis Teachers Union to represent them. The other major teachers group is the predominantly white St. Louis Teachers Association which has about 1000 fewer members than the Union. The starting salary for a teacher with an A.B. degree is $9,250; with an M.A., $10,250.[3]

The School Board. The board has clear control of the public school system. The twelve members are responsible for making policy and operating the system. Members are elected at-large, on a non-political ballot. The term of office is six years, with four terms ending every two years. Board members serve without pay.

Prior to 1959, the St. Louis school system was controlled by an alliance of Democratic committeemen and municipal officials. Control over the school system prior to 1959 was a political prize. It was a major source of patronage and every nonteaching position had a political price tag attached to it.*

In 1953, a number of civic leaders concerned with schools, primarily from the West End Community Conference, began to meet informally. Their goal was to achieve reform in the school system by supporting a slate of candidates for the school board. Mr. Daniel Schlafly was the only reformer elected to the board in the 1953 election. In 1955, two reform candidates were elected; none ran in the 1957 election.*

During this period Daniel Schlafly was a dissident within the board working hard to create a public issue over school corruption. In 1959, he financed several law suits against school officers accused of corruption. He succeeded in forcing the building commissioner out of office. He also succeeded in photographing school maintenance personnel working at the home of the school board president while on the school payroll. The resulting publicity made the school board election of 1959 a major issue and the reform slate was elected. In 1960 the reform group formed an organization known as CAPS (Citizens Association for Public Schools), and, in 1961, after a bitterly fought election, all five CAPS candidates were elected and the reform group took control of the school board. Daniel Schlafly was elected president and the board moved quickly to establish a merit system for the noninstructional staff.*

With political patronage no longer available, party leaders lost interest in school board elections. CAPS ran four candidates in 1963 and they were unopposed. CAPS dissolved after the 1963 election as a result of internal dissension. It has since been replaced by a smaller, narrowly based, Citizens' Committee for Quality Schools. Reform candidates were elected in 1965 and 1967 with little opposition.*

Schlafly has served on the board continuously since 1953. He has been president of the board four times, and has been the major power within the board during most of his 25-year tenure. Schlafly has been an extremely popular figure. Some observers say that he could have been elected Mayor had he wanted the position.

But Schlafly's first love has been education. Owner of a lucrative family beverage business(Schlafly is the brother-in-law of ERA opponent Phyllis Schlafly), he has made the school board his real occupation. Schlafly keeps himself exceptionally well-informed about board issues, and commands respect even from his opponents. He is demanding of other board members as well. They must attend meetings on the average of four nights a week, plus doing a considerable amount of "homework." One newcomer to the board said she receives a two-inch-high stack of material from Schlafly nearly every day, and would not dare go to sleep without having read and understood every bit of it.

Nevertheless, Schlafly no longer wields the power over board members that he once did. He and the other pro-business members now face substantial opposition on many issues from a "grassroots" faction on the board. Schlafly is now 63, and there is speculation that he may soon retire.

Despite the fact that 73 percent of the students in the school system are black, all but two of the twelve board members are white. Of the two blacks on the board, one is married to a physician and lives on one of the most posh streets in St. Louis. A vacancy appeared on the board early this year when one of the white members resigned. The Mayor was expected to appoint a black to improve racial balance. Instead, he appointed a white, former teacher who lives on the southside. This prompted a black state senator to propose legislation that would allow nine of the twelve board members to be elected from subdistricts rather than on an at-large basis.

Weaknesses of the Elected Board. The absence of widespread community participation in school affairs is a serious concern in a city where the board exercises the considerable power that it has. There is effectively no countervailing power to the school board in the community and the complaint most frequently heard is the lack of responsiveness of the board to the community.*

On the other hand, the board is accepted as sincere and uncorruptible. One critic interviewed stated that public apathy is partially the result of satisfaction with the work of the school board. "If the board was a bad board," he stated, "CAPS would reemerge in an attempt to replace it."*

The school board does reflect the general conservatism within the city in its spending policies, its limited building program and its adherence to the neighborhood school principles. The business community is well represented on the board and Mr. Schlafly has ties to Civic Progress, a small elite group of business leaders who comprise the power of the downtown business community. The board must also look to the city's voters for fiscal and political support in a city in which one-third of the voters are Catholic and nearly one-fifth are elderly persons with no children in the school system. These limitations require that the board exercise fiscal restraint.*

Innovation. Despite the fact that the St. Louis public school system pioneered kindergartens (1873) and ungraded primaries (1959), innovation has been very limited in recent years, in part a result of the old German conservatism that still lingers. Sex-education was added to the curriculum only ten years ago.

Until recently, the most ambitious program in the district was the Banneker Project--an experimental program initiated by a charismatic assistant superintendent out of concern that the city-wide tracking system worked against blacks in that district. The program was aimed at increasing student motivation, and had considerable success in enlisting parent participation. Preliminary tests showed that the program had significantly increased student achievement; however, after the novelty had worn off, Banneker students were once again below the national average.

Most of what little innovation has come about in the St. Louis school system has resulted from the efforts of the Danforth Foundation. Deriving its original income from the St. Louis-based Ralston Purina Company, the Danforth Foundation has made education its principal interest. For many years, the Foundation has been carrying out projects aimed at increasing curriculum innovation and citizen participation.

Racial Segregation. Prior to Brown, St. Louis public schools were segregated by state law. In June, 1954, the school board adopted a three-step desegregation program which eliminated race as a required criterion in determining what school a child was to attend. James A. Scott, a black administrator, was given responsibility for redrawing elementary and high school boundaries so as "to provide the best use of the facilities of a given school by the students living in the area of that school."[4] At the same time, all reference to race or color was eliminated in the records of the school system.

The school board's desegregation policy brought about only negligible integration of the public schools. The nature of residential patterns in St. Louis (blacks in North St. Louis; whites in South St. Louis) and the school board's continuing commitment to its neighborhood school concept meant that most schools stayed predominantly black or predominantly white. In the 1972-73 school year, out of 152 regular elementary schools, 92 were all or nearly all black, 39 were all or nearly all white, and only 21 were less than 90 percent of one race. Of the ten academic high schools, three were 100 percent black, two were more than 90 percent black, and three were more than 90 percent white. Only two high schools were racially integrated (see Appendix B).

As neighborhoods underwent rapid turnover in racial composition, the schools experienced a similar change. Of the 25 schools which reached a black enrollment of approximately 50 percent during the period 1953-73, 22 increased to about 90 percent black, within an average period of 3.59 years.

The percentage of public school students in St. Louis that are black has always been higher than the percentage of residents in St. Louis that are black. This is a result of the fact that more blacks than whites are of child-bearing age, and that approximately one-fourth of all white children attend Catholic or Lutheran parochial schools. Thus, in 1954, when blacks made up about one-quarter of the City's population, more than a third of the public school students were black. By 1970, the comparable figures were 41 percent (of all residents) and 65 percent (of all students). As a consequence of this, public school enrollment continued to increase*, even as the City's overall population declined. This produced overcrowding, particularly in schools in black areas of the city.

To reduce the overcrowding, the board bused black students to underutilized schools, particularly in South St. Louis. The Board followed a policy of "in-tact" busing, whereby complete classrooms of black children were transferred and kept segregated in the white receiving school. The black students were taught in a separate classroom by their own (black) teacher; they were also given a separate recess period and lunch period from the white students. The board said this was necessary because of "schedule conflicts." In 1964, civil rights groups protested this policy, and the board eventually modified it. This was the only occasion, until recently, that St. Louis civil rights groups organized in opposition to the school board.

In addition to busing, the board rented premises, provided portable classroom units, and converted non-classroom facilities to classroom use in overcrowded black schools. This resulted in increasing the black enrollment of these schools. The board also resorted to permanent school construction in overcrowded neighborhoods. The 1962 bond issue financed construction of a number of schools that opened predominantly black. The bond issue received its strongest support in black wards where these schools were to be located. When these schools were constructed, the board was able to tighten the attendance zones in those areas, resulting in more uni-racial enrollments.

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* Enrollment peaked in 1967-68, with 117,676 students. By 1973-74, that figure had dropped below 100,000. Currently (1977-78) enrollment is 78,852 (see Appendix C).

The board has hired teachers without regard to race. In 1973, 56 percent of the classroom teachers were black.* However, up until 1976, the composition of the teaching staff within schools was as uni-racial as the student enrollment. A black served as Acting Superintendent of Schools for one year and is currently Deputy Superintendent. Of the six administrative district superintendents,   are black. The first black was elected to the board in 1955. Since that time there has been at least one, but never more than four, black board members at any one time.

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* See Appendix D.

II. The Lawsuit

The lawsuit[6] was prompted by the School Board's actions in busing black children in North St. Louis. The Yeatman Elementary School, built in a middle-income black neighborhood with funds from the 1962 bond issue, opened over-crowded in 1967. The Board responded by busing some of the Yeatman children to other, inferior schools, most notably the Bates School, a deteriorating facility in the black ghetto. At the same time, the Board was busing white students from the overcrowded, all-white Froebel School in South St. Louis to a less desirable school.

Parents from both the Yeatman and Froebel Districts protested the Board's actions. The Board put a halt to its busing of the white, southside children, but continued to transport black children from Yeatman to Bates. This added insult to injury, and prompted a group of black Yeatman residents to organize in opposition. Mrs. Minnie Liddell, whose son Craton Liddell was among those bused from Yeatman to Bates, became the group's president and major spokesman. Mrs. Liddell is a clerical worker for the federal government. Her husband is a postal employee.

In August, 1971, Mrs. Liddell, on behalf of the parent group, wrote to the district superintendent for the region containing Yeatman School. The letter stated that the parents "firmly believe that busing of our children is in direct opposition to the neighborhood school concept; and that busing is harmful emotionally, socially, and educationally to black children." The letter proposed that the superintendent utilize temporary classroom space (specifically three churches where the parents had located six classrooms) "in order to keep our children in neighborhood schools."[7]

Subsequently, the group prepared a position paper for the School Board.

The group now called itself the Concerned Parents of North St. Louis (Northside Parents), and estimated its membership at about 150. The position paper reflected a rather different attitude toward busing, and made no reference to the desirability of neighborhood schools:

> It should be clearly understood that Conerned Parents are NOT opposed to the busing of children in order to achieve racial balance and better educational opportunities for their children.[8]

The position paper identified three objectionable Board actions: 1)busing from Yeatman to Bates, which, in the parents' opinion, was done so as to keep Bates a Title I school; 2)busing from Yeatman to inferior all-white schools in South St. Louis where there was enforced segregation, and the children were made to feel separate and apart; and 3) accommodating the protests of white parents but not black parents. Finally, the position paper asked the Board to adopt split sessions at Yeatman (with integration of Yeatman staff and students a desirable consequence), draw up a plan for meaningful racial balance which could include busing so long as there was no sacrifice to educational quality, address the problem of integrating the teaching staff at all schools, involve parents in the formal decision-making, and use safety-equipped yellow school buses rather than the regular public service buses then in use.[9]

The Northside Parents also retained two attorneys for the purpose of suing the Board. Joseph S. McDuffie and William P. Russell were older, black attorneys, partners in their own small firm located in North St. Louis.

The two men's law practice had consisted largely of police court cases and other small suits. Neither had any experience with school desegregation law; McDuffie, who never attended law school and became an attorney through apprenticeship, said that when they were retained to sue the Board of Education, they had to go to "school" themselves--studying other school desegregation cases in an effort to learn legal strategies and techniques.

The Northside Parents filed suit in the U.S. District Court, Eastern District of Missouri, on February 18, 1972. By means of a rotating wheel, the case was assigned to Judge James H. Meredith. Meredith was at that time 58 years old. He had been on the District Court bench for ten years, and Chief Judge for one year. A Democrat, Meredith had been Senator Stuart Symington's campaign manager in 1952 and again in 1958. Symington recommended Meredith for the position. His appointment by then-President John Kennedy followed in 1962, making Meredith one of Kennedy's first appointees to the federal bench.

Meredith grew up in a small town in the southeastern corner of Missouri known as the Bootheel. He graduated from the University of Missouri Law School in 1937, and, among things, worked as an FBI special agent in San Francisco for two years. He was later legal secretary to the governor of Missouri (1949-50), Chief Counsel for the Missouri Department of Insurance (1950-52), and a partner in a major St. Louis law firm.

The suit was filed as a class action. Craton Liddell, et al., as plaintiffs, versus the individual School Board members, the five district superintendents, and Ernest Jones, the black Acting Superintendent. Plaintiffs filed a ten-page complaint enumerating their objections:

> 14. ...particularly through the five (5) district setup, the defendants and their predecessors in office have effected and perpetuated racial segregation and discrimination...
>
> 16. [D]efendants...have allocated and permitted to be allocated educational resources, including, but not limited to, funds, teachers, buildings, textbooks, materials and supplies, in a [racially discriminatory manner].

> 17. ...[D]efendants...by the devices, inter alia, of separate and racially discriminatory curriculum...frequent redistricting of school boundaries and school district boundaries, new school locations and construction, the assignment of all children to schools within the metropolitan district of the City of St. Louis, and the assignment of teachers in the school system, have acted affirmatively to [perpetuate] a dual biracial school system.
>
> 19. ...[T]he school boundaries and district boundaries within defendants' school districts have resulted in excluding black children from the educational resources and facilities which would otherwise be available to them; that the...boundaries serve no bona fide educational goals, policies or practices which could not be served equally well by district configurations [which are non-segregative].[12]

Prior to filing suit, Mrs. Liddell sought financial support from the St. Louis branch of the NAACP. By Mrs. Liddell's report, she was "turned down cold." "They said the schools were integrated and they had rapport with the School Board and were helping the board to integrate the schools."[13] The local NAACP later denied ever having said that, recalling rather that the reasons were a lack of funds and a feeling that Liddell's group didn't want to give the NAACP much say in how the suit would proceed.[14]

The Legal Defense Fund (LDF) did agree to finance the suit. In return, the LDF lawyer with whom McDuffie and Russell talked, asked that he be given a draft of the proposed pleading, when it was prepared, so that he would have a chance to look it over and make suggestions. McDuffie and Russell sent the draft pleading to him as agreed. They waited for a reply, but heard nothing. The Northside Parents group was eager to file the suit prior to a fundraising event it had scheduled. After an unsuccessful attempt to reach the lawyer at LDF, the parent group filed suit on February 18, 1972. When the LDF lawyer learned of this through an Associated Press story, he rescinded the agreement for financial support. Some of the black parents felt that the LDF had intentionally found a way out of the agreement. By their report, a northern Senator was at that time pushing some anti-busing legislation and, in an effort to forestall the legislation, the LDF had secretly agreed to suspend temporarily any school desegregation challenges.* [15]

Subsequently, the LDF agreed to commit one of its lawyers to the case--Philip Kaplan of the Little Rock, Arkansas firm of Walker, Kaplan and Mays. Kaplan assisted with the case for only about a year. When Judge Meredith ruled that the suit could not proceed as a class action (a ruling which he later reversed), Kaplan filed a motion without consulting McDuffie and Russell. As a result, they dismissed Kaplan, later describing his actions as "judge-baiting" and counterproductive to the plaintiffs' relationship with Meredith. They subsequently reimbursed the LDF voluntarily for the amount of time Kaplan had devoted to the case. [16]

The School Board was represented by John H. Lashly and Paul B. Rava, senior partners in the St. Louis law firm of Lashly, Caruthers, Thies, Rava & Hamel. The Lashly firm had served as counsel to the Board since about 1970, when the attorney then representing it retired. The firm is one of the most prestigious in St. Louis. Lashly has several times run for president of the American Bar Association. Another partner, Edward Filippine , was recently appointed to the Eighth Circuit Court of Appeals.

The first year after the suit was filed was taken up with discovery proceedings. The trial, initially set for October 2, 1972, was reset repeatedly by request of the parties. Plaintiffs' lack of funds with which to carry out discovery was a primary reason for the continual delays. In October 1973, Judge Meredith countered his earlier (May 1973) ruling, and allowed the suit to go forward as a class action. The Court docket records state that notice to that effect would be mailed to all local radio and television stations listed in the Yellow Pages. [17]

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* A former LDF attorney, now in private practice in San Francisco, expressed skepticism that the LDF ever made any such secret agreement. However, the attorney was unfamiliar with the details of the St. Louis case.

Several weeks later, the Board moved to have Meredith name 21 County (suburban)school districts, as well as County and State officials, as co-defendants. (Three of the 21 districts were then involved in another school desegregation suit pending before Meredith.) Plaintiffs opposed the move, stating that it was premature since the Court had not yet decided whether the St. Louis schools were de jure segregated. Moreover, plaintiffs felt that before turning to a metropolitan remedy, the parties should consider what could be done within the boundaries of the city. Meredith denied the motion without explanation. He stated later that "there was no point to it,"[18] referring to the fact that in 1973, before the Supreme Court's ruling in Milliken, suburban districts could be brought into a remedy without a showing of violation on their part.

As discovery proceedings continued, the plaintiffs came to rely heavily on the efforts of William B. Feild, a Miami Florida consultant brought in to obtain data from School Board records. Feild had been a public school teacher, professor, and consultant in several school desegregation suits, working in some cases for school boards and in other cases for plaintiffs. Feild agreed to work on credit for the financially-strapped Northside Parents. McDuffie later remarked that getting Feild's help was the best thing that ever happened to them.[19]

Feild's conclusions, contained in a deposition filed in February 1974, included the following: 1) Based on data from the 1972-73 school year, only three of ten high schools and six of 150+ elementary schools had a racial mix that was within 10 percent of the ratio for the district as a whole. 2) School officials assigned teachers and administrators in a way that made the schools racially identifiable. Only 19 schools had a racial mix within 10 percent of the districtwide racial balance of teachers. 3) Of 21 busing exchanges in 1972-73, 11 were from black schools to black schools, two from white to white, four from black to integrated, four from black to white and none from white to black. 4) School additions were constructed so as to keep black students in black areas and white students in white areas and to guarantee the perpetuation of the dual system.[20]

In deposition, attorneys for the School Board asked Feild whether an across-the-board busing plan to achieve a 70-30 black-to-white ratio in all the schools would not result in further white flight. "I think this would be unquestionably the case," Feild responded.[21] Daniel Schlafly, member and former president of the Board responded that massive busing or the use of other techniques to bring all schools close to the 70-30 black-to-white ratio would be expensive, impractical and tremendously unpopular. Schlafly said he couldn't approve the adoption of such a plan because it wouldn't work.[22]

While the Board disagreed with some of Feild's factual findings, many of them were beyond disagreement. Meredith told the attorneys that there was no use wasting time at the trial with things about which both parties could agree--enrollment figures, racial percentages for each school, etc. He instructed the attorneys to draw up a stipulation containing those non-contested facts. Each set of attorneys prepared a draft stipulation of facts and sent it to the other. Several revisions of drafts were exchanged through the mail before the attorneys sat down with one another to hammer out the final product. In all, it took about 60 days to draw up the stipulation of facts. The final product is 50 pages in length, not counting exhibits, and contains 75 facts and conclusions admitted by both parties. The language is often stilted and occasionally conflicting, reflecting the greatest difficulty that the attorneys had--finding language agreeable to all parties.[23]

In one of the key stipulations, the School Board concedes that de facto segregation exists, but denies responsibility for it:

> 22. Notwithstanding the actions taken by the Board subsequent to Brown, as of the date this action was filed and as of the date hereof, segregation, as a matter of fact, is present in the public school system of the City in the respects hereinafter noted.[24]

In addition, the stipulated facts cover the following subjects: jurisdiction; plaintiffs; defendants; 1876 boundaries of school district; discriminatory housing practices; increase in black population 1940-1970; population changes and movements; increase in black enrollment in the schools; pre-Brown enrollment by race; post-Brown period; integration measures; racial composition of pupils, 1962-63 through 1973-74; ESEA schools for economically disadvantaged children; five-administrative-district organization; "other" schools outside of these five districts; racial composition of enrollment, school boundaries and Neighborhood School Concept; impact of inter-city black migration; school construction and remodeling; tilting point; teaching staff integration; non-certified personnel; administrators; comparability between predominantly black and predominantly white schools with respect to pupil-teacher ratios; instructional curriculum; extracurricular activities and facilities; building construction and maintenance and budget allocation; specialized high school for the mentally retarded; Work Study; ESEA Title I specialized high school; rates of non-promotion, drop-out, and withdrawal for black students versus white students;and number of vacant classrooms in each school.

The parties to the suit filed the stipulation of facts on June 7, 1974. The document was considerably more extensive than what either Meredith or the attorneys originally had envisioned. A primary motivation was both parties' desire to avoid the expense of drawn-out litigation.

By this time it was clear that there would be no need for a trial with open hearings. The stipulation constituted Findings of Fact. Next, Meredith instructed each party to submit Conclusions of Fact and Law. This was done in August, 1974, thus clearing the way for Meredith to make a ruling in the case.

III. Reaching the Consent Decree

Throughout the late summer and fall of 1974, the two parties continued to give Meredith information updating the consent decree, while they waited for him to issue a ruling.[25] At 7 a.m. one morning, while driving to his office, School Board attorney Paul Rava came up with an idea that he thought might avoid the need for Meredith to rule in the case. Rava was familiar with the use in antitrust cases of a consent decree--a remedy to which both parties mutually agree. But to his knowledge, this remedy-technique had never been applied in a desegregation suit.

When Rava proposed settling the Liddell suit through a consent decree, even some of the other attorneys in the Lashly firm were skeptical that it was legally feasible, much less that it would work. McDuffie and Russell were actually more receptive to the idea. The process of drawing up the stipulation of facts had produced a congeniel working relationship between the two sets of attorneys. In particular, McDuffie and Russell had come to feel they could trust Lashly and Rava. A spirit of mutual cooperation existed which made it possible for the consent decree to evolve, something which could never have occurred when the suit was filed in 1972.

The attorneys went to Meredith with the idea of a consent decree (they had not yet drafted one) in early December. The Judge, who had been planning to issue a decision before the end of the year, was initially skeptical. But as the attorneys talked-up the idea, Meredith became more enthusiastic. (Aside from the substantive merits of the idea, Meredith found attractive the suggestion that a consent decree would dispense with the need for an appeal.) He commented later that after some persuasion, "it seemed worth a trial."

However, Meredith was eager to end a case that had at that point dragged on for nearly four years. (The Eastern District of Missouri ranks first in the Eighth Circuit and fifth in the country in average case-disposal time.) He told the attorneys they had "better get going," and imposed a 21-day deadline for reaching a settlement. The meeting with Meredith also ended with the attorneys agreeing to go to the Danforth Foundation for help in giving substance to the consent decree.

The Danforth Foundation was receptive to the request. The Foundation agreed to underwrite the endeavor, and promptly went about bringing together a body of independent experts whose task it was to decide what could be done to integrate the St. Louis public schools without resorting to busing. Rava was in Barnes Hospital during part of those 21 days. He describes the appalled looks of his attending physicians who would no sooner walk into his room and pick up his chart than Rava's bedside phone would ring and he would excuse himself to discuss with the caller the latest proposal by the Danforth consultants or dictate another section of the consent decree.

The substance of the decree reflected input from the School Board members and the parent group, as well as from the consultants. As with the stipulation of facts, the most difficult task was not agreeing on the substantive content, but rather coming up with specific language acceptable to both parties. (Russell estimated that the decree went through close to fifteen drafts.) For example, the attorneys clashed over the proper wording to use in stating that segregation in fact existed in the schools. One attorney wanted to use the term "de facto segregation," another objected to that. At Lashly's suggestion, they adopted the basic language from the stipulation of facts: "as of this date hereof, segregation is present, as a matter of fact, in the Public School System."

The attorneys then took their mutually agreed-upon draft to Judge Meredith. In addition to helping finalize and crystalize the decree, the Judge made one significant input based on something he had learned in the three-district County school desegregation case. In that suit, Meredith had issued a remedy containing very specific orders that the defendant school boards were to carry out. However, when the school boards tried to get HEW funds designated for schools undergoing desegregation, the funds were denied because of the specificity of the orders and the lack of voluntary element to them. To avoid the same problem in this case, Meredith proposed that the consent decree be worded more vaguely, and in such a way as to convey the sense of voluntary action by the Board.

The attorneys agreed to the decree, and Meredith entered it on December 24, 1975. Christmas Eve is an unusual date for a legal action of that magnitude. It reflects Meredith's eagerness to settle the matter while enthusiasm was running strong.

The body of the consent decree is a scant four pages. Paragraphs 3, 4, 5, 9 and 10 are the most significant. Paragraph 3 admits to the existence of de facto segregation, but denies guilt on the Board's part:

> 3. Nothing herein contained shall be deemed to be an admission on the part of defendants that the charges contained in plaintiffs' Complaint, as amended, are true. However, notwithstanding the actions taken by the Board subsequent to Brown, as of this date hereof, segregation is present, as a matter of fact, in the Public School System of the City of St. Louis, in the particulars itemized in said Stipulation of Facts. [citation omitted]

Paragraph 4 is the injunctive paragraph:

> 4. Defendants, their agents, officers, employees and successors, and all those in active concert and participation with them shall be enjoined and prohibited from discriminating on the basis of race or color in the operation of the School District

> of the City of St. Louis, and shall be required to take affirmative action to secure unto plaintiffs their right to attend racially nonsegregated and nondiscriminatory schools, and defendants will afford unto plaintiffs equal opportunities for an education in a nonsegregated and nondiscriminatory school district, and shall be required to take the affirmative action hereinafter set forth.

Paragraph 5, calling for transfer of teachers, is the most concrete provision in the decree:

> 5. With regard to the personnel of the St. Louis public schools, the defendants are directed and ordered to take the following measures which are necessary or proper in order to reduce racial segregation:
>
> (a) Effective before the beginning of the 1976-77 school year, defendants shall have planned, developed and carried out a program through volunteers and, if necessary, through mandatory appointments and assignments, to provide a minimum of two regular classroom teachers and no less than 10% of the minority teachers and other staff of either race in each school of the system.
>
> (b) The minimum percentages provided for in the preceding paragraph shall be increased by defendants to no less than 20% of the minority teachers and other staff of either race in each school of the system before the beginning of the 1977-78 school year, and to 30% of the teachers and other staff before the beginning of the 1978-79 school year.

Paragraph 9 ultimately became the stumbling block in the decree: Its vague wording reflects the parties' effort to make the School Board eligible for HEW funds:

> 9. Before the beginning of the 1977-78 school year, defendants shall make a study of realignments of all elementary feeder schools to the academic high schools for the purpose of reducing racial isolation and segregation at the said high schools, and shall submit a report thereon to the Court, on or before January 15, 1977, with implementation to begin September, 1977.

Paragraph 10 was worded vaguely for the same reason:

> 10. The defendants are hereby ordered to make a study and report to the Court on or before May 1, 1976 as to whether or not the following items will assist in eliminating or reducing segregation:

> (a) Establishing elementary magnet schools with specialized curriculum, having an open enrollment by application.
>
> (b) Establishing high schools for the study of the visual and performing arts, for the study of mathematics and physical and natural sciences, and other subject areas, such schools having open enrollment by city-wide application.
>
> (c) Recognizing that the above measures are basically experimental in nature, a study of the feasibility of curriculum improvements or other changes that should be instituted in the system as a whole shall be undertaken for the purpose of increasing the quality of education throughout the system, all within the context of reducing racial isolation in the schools and with the goal of desegregating the school system. A report shall be made to the Court by May 1, 1976, with implementation beginning with the school year 1976-1977.

(A copy of the consent decree in its entirety appears in the Appendix.)

The members of the School Board were generally quite pleased with the consent decree. For one, they were glad just to have the suit settled at last. For months, school officials and staff had been kept busy gathering and updating information in response to interrogatories. Dr. Robert Wentz, who took over as Superintendent of Schools shortly before the consent decree idea was proposed, later remarked that "a case like that just sits and festers." Not surprisingly, Wentz said he preferred the consent decree to being controlled by an external force, referring to the Court, since "it's difficult to run a school system under that arrangement." He also noted that a court order "can take strange directions when it comes to implementing it."[26]

The defendants generally felt that the consent decree was a just remedy. They did not feel they had been let off easy. Some members felt that, had the Board been found guilty, the remedy would have been on the order of the consent decree.

Board members felt the consent decree was feasible because of the likelihood of getting funds provided under the federal Emergency School Aid Act (ESAA) for schools in the process of desegregating. For a long time, the

Board had felt it could not qualify for those funds because eligibility is tied to compliance with the "Singleton Rule." That rule states that if X percent of a district's personnel is minority, then the number of minority staff at each school must equal no less than 75 percent of X percent and no more than 125 percent of X percent. In St. Louis, where approximately 60 percent of the teachers at that time were black, that would have required that a minimum of 45 percent of the teachers in each school be black. To achieve that would have involved moving nearly two-thirds of all teachers.

However, when Wentz took over as superintendent, he pointed out to the Board that the Singleton Rule did not apply if a school district was acting under court order. (Wentz was familiar with the federal requirements from his previous position as superintendent of the Pomona, California school district, where he had brought in about $2 million in ESAA funds.) Wentz was uncertain whether a consent decree would qualify as a court order, but the Board's attorneys were confident that it would.[27]

The plaintiffs were also pleased with the consent decree. The Northside Parents did not view the agreement as insurance against the possibility of an adverse ruling from Meredith. They quite honestly expected him to rule against the School Board, but viewed the consent decree as a superior outcome since it meant that issues on which both parties agree could be handled without a judicially-imposed remedy. Moreover, the parents group viewed the decree as only the first step in the desegregation process. Mrs. Liddell's comments to the press at the time characterized the plaintiffs' sentiments:

> We wanted them (the board) first to admit the schools were segregated and commit themselves to doing something about that. We wanted to handle it in two phases--initially a consent

> judgment, and then we'll get busy with a plan that has total involvement of the community.
>
> This is what has been wrong in some other areas. A bunch of experts have come in and decided what would be good. That's why we refused to put this ball game together at once.[28]

Mrs. Liddell also viewed the vague language in the consent degree as a plus:

> We want the plan to be one that comes from the total community and that's why we agreed to only general language. There's nothing that ties you down to what eventually might take place.[29]

The consent decree received banner headlines in newspapers around the country. Judge Meredith told reporters at the time, "The agreement may be an alternative to the type of plan which is causing so much confusion in other parts of the country," referring to the violence in Boston and Louisville, Ky., resulting from court-ordered busing. "Hopefully, it is an innovation that will be successful." Meredith also stated that the agreement "does not and will not include busing."[30]

The two major St. Louis newspapers, the City's black newspapers, and community leaders all praised the consent decree. The Globe-Democrat called it a "common sense school decision" whereby "St. Louis may have shown the country how it can be accomplished:"

> Instead of zeroing in on forced busing as the primary goal, the Board of Education and the black [plaintiffs] raised their sights by concentrating on steps that would provide equal education for all students without relying on mandatory busing.[31]

The Post-Dispatch noted that while busing is not ruled out of the agreement, "both sides in the suit recognize that large-scale busing in a school district with a black majority could be counterproductive in terms of desegregation, and both sides insist that they do not want to 'shove something down people's throats.'" However, the Post warned that "there remains a vast gap between the broad terms of the consent decree signed by U.S. District Judge Meredith and their accomplishment."[32]

The black newspapers in St. Louis had similar praise for the consent decree, and perceived that while forced busing was undesirable, the plan did not rule that out at some future time:

> First, if the plan works it does provide an alternative to forced busing for school integration. This is not to say that forced busing will not be required ever, here or elsewhere, but simply put if our school system can be desegregated and the racial isolation of students gotten rid of by this plan--then there will be no need for busing.
>
> Obviously, if the plan doesn't work--especially since the court and litigants now agree that segregation DOES exist in the St. Louis school system, then, busing and all other tools to accomplish conformity to constitutional law might be required.[33]

Another black newspaper, the Sentinel, observed that "...in most instances, black parents have merely wanted equality in teaching, and properly so. It has only been when school boards have tried to pretend a problem did not exist and then refuse to move in any affirmative way to resolve or work with any aspects of the change has (sic) problems arose."[34]

An "atmosphere of euphoria" surrounded the case at Christmastime, 1975.[35] The attorneys were gratified, but not really surprised, by all the praise heaped on them. They felt it was an elegant solution deserving of acclaim. Neither Judge Meredith nor any of the attorneys anticipated any strong objections to the agreement. After all, the NAACP had declined to get involved early in the suit. The Justice Department had shown no interest in the case. When notice went out in 1973 advertising the case as a class action suit and inviting anyone to intervene, no one did. Judge, plaintiffs and defendants all viewed the required public notification to class members of the consent decree as merely a formality. But to satisfy statutory requirements, Meredith set aside January 23 for hearings on any opposition to the decree.

IV. Implementing the Consent Decree

Objections to the consent decree arose almost immediately from the city's teachers groups. The 2600-member St. Louis Teachers Union,official bargaining representative for the city's teachers, said the balanced staffing provision was vague and violated the terms of the union's contract with the board, and announced that it would oppose the plan in court. The Union objected to its not having been included in drawing up the agreement. Rava responded that the teachers were not consulted because of the 21-day deadline for reaching a settlement which Meredith had imposed.The 1000-member St. Louis Teachers Association also said it would oppose any arbitrary transfer of teachers to implement the plan.[36]

Both groups criticized the plan because it contained no specific program for desegregation. Said the Union, "The judgment deals specifically with staffing in the schools but provides no concrete plan to achieve the original purpose of the court suit, which was to desegregate the schools and to decrease overcrowding in certain areas."[37] Superintendent Wentz called on teachers "to keep in mind that this isn't a process of desegregating the staff. It is a process of creating a model for a pluralistic society and that these models are visible in all of our schools."[38]

On January 16, the deadline for filing objections to the plan, the Teachers Union submitted a brief asking Meredith to modify the plan so as to make explicit the Union's right to discuss transfer procedures with the Board. The Teachers Association also filed a brief which attacked the plan for failing to guarantee that students would be able to attend racially integrated schools and for failing to provide safeguards against teacher transfer abuses.[39]

But the surprise of day came when the St. Louis branch of the NAACP petitioned for a new court order requiring "total faculty and pupil desegregation" by September. The petition stated that the consent decree, written in "vague generalities," would not truly desegregate the schools, and that the Northside Parents were no longer adequate representatives of black parents because they had "acquiesced" to the Board.[40] Nathaniel Jones of New York, general counsel to the NAACP, announced in a press conference in St. Louis that busing would not be ruled out as a method of desegregation: "There is no alternative to desegregation under the Constitution, and if it takes busing to end segregation, so be it."[41]

Charles E. Carter, associate general counsel of the national NAACP, said that if Judge Meredith allowed the association to intervene, the consent decree would have no effect, because it would not be agreed to by all the parties. The Board's attorneys took the position that while Meredith could set the consent decree aside if he allowed the NAACP in the case, he could also hold the decree in abeyance. Reverend John Doggett, president of the NAACP's St. Louis branch, announced that he would oppose giving the decree even a trial period.[42]

Carter also noted that he could recall only one other desegregation case--Dallas, Texas--where the national NAACP had intervened, rather than been the initiator of the suit. None of the NAACP's suits had ever been settled by means of a consent decree, to Carter's recollection: "You just don't find a consent decree that deals with the (segregation) problem on a national level. It may deal with the local problem, but it makes bad law nationally, and that's what we're concerned with."[43]

The NAACP's move took Minnie Liddell and the Northside Parents group by surprise. Mrs. Liddell told reporters that she had been "turned down cold" when she had asked the association for assistance in 1972.[44] The regional director of the NAACP denied any recollection of Liddell's request and said the association didn't offer the plaintiffs financial support because it had no funds. St. Louis NAACP attorney David Lang said that the association assumed there was no need to get involved in the suit when it was filed, but that the consent decree changed that because it failed to protect the interests of all children in the City.[45]

The parents group reacted negatively to the NAACP's move. The group contended that court-ordered busing was not the answer. Rather, it would polarize the community and even lower the quality of education. In a city that was largely black, the parents did not object to having some all black schools, but felt that each child should have the opportunity to receive quality education and to attend an alternative school.

Some of the parents felt the NAACP was being anything but altruistic. One parent named as a plaintiff said the association had decided to enter for "mercenary and political" reasons--in an effort to enhance its image.[46] One plaintiff representative speculated that Mrs. Margaret Bush Wilson, national board chairman of the NAACP and a St. Louis lawyer, had felt upstaged when the media gave such favorable publicity to a desegregation settlement (the consent decree), in which she had played no part.

The Board filed a motion asking Meredith to deny the NAACP's request to intervene since the association had not come forward two years earlier when the Court advertised the case as a class action. Superintendent Wentz stated in an affidavit that, in order to receive ESAA funds, the school district must be implementing a plan which is the "final order" of a federal court.[47] If the NAACP were allowed to intervene, the plan would not be final. This would mean the end of the plan for the following year, since many of the programs in the plan were contingent on getting ESAA money, and the deadline for applying for those funds was only weeks away. The Board's motion also tried to make the opposition expressed to the consent decree seem a virtue:

> It should be noted that on the one hand the objecting teachers complain about what is expected of them under the judgment of the court, while on the other hand the NAACP... complain(s) that the judgment does not go far enough...It is often said that dissatisfaction at the extremes is the test of a good settlement. It is most earnestly submitted that this is but another case in point.[48]

On January 23rd, Meredith heard oral arguments by opponents of the consent decree. He overruled objections submitted by the teachers groups, but directed the Board to sit down with the groups and work out a transfer policy to be submitted to the Court within the next 30 days. In a decision delivered from the bench, Meredith denied the NAACP's petition to intervene. He ruled that the NAACP's move was "untimely," that the consent decree "in its present condition is adequate at this time," and that the plaintiffs had properly represented the class.[49] Meredith added that he would welcome suggestions from the NAACP about how to carry out the plan.

The plaintiffs applauded Meredith's decision. Russell had argued before Meredith that "[the NAACP's] application for intervention was not brought in good faith. The NAACP does not have the moral fiber to represent the members of the class."[50] McDuffie stated that the association's claim that the consent decree was inadequate was "based on a misunderstanding of what the decision is supposed to do." He said the decree ordered the School Board to eliminate segregation and gave the Board a reasonable timetable for gathering the data necessary to do so.[51]

Immediately following Meredith's ruling, the NAACP announced that it would appeal. (At the same time, the association denied charges that it had previously refused to assist the Northside Parents. Joseph W.B. Clark, President of the local NAACP branch at the time the suit was filed, said the group was turned down because it asked for financial rather than legal assistance, and because it didn't want to give the association much say in how the suit would proceed.) A local NAACP attorney told the press that Meredith's final comment (inviting NAACP suggestions) and the NAACP's interest in the case "put the Board on notice that there is a substantial amount of concern about the effect of the order and that it will have to continue to negotiate in good faith." [52]

The same day that Meredith ruled against the NAACP, the Board detailed its proposed Magnet (and Specialized) School Program. The proposal, to be submitted to HEW, outlined a nine-part program: two specialized high schools--one for visual and performing arts, another for science and math; two specialized middle schools--visual and performing arts, and a career-oriented program; and five "magnet" elementary schools, each offering a different program emphasis. Also proposed were a number of supplementary programs, including one to train teachers who would staff the magnet schools and a community relations program.

The proposal estimated that the magnet schools would involve 1000-1500 of the 61,000 elementary schools students, and that about 3800 students would participate in some aspect of the overall program. The estimated cost was $7,000,000 with about half of that to be federally financed. [53]

In May, the Board submitted its proposed plan to Meredith in response to Paragraph 10 of the consent decree. In addition to the nine-part Magnet School Program, the Board proposed having paired high schools which would hold common classes in certain subjects; "programs of emphasis" in social studies and foreign languages; paired schools which would share activities such as sports events, student newspapers and teachers' meetings; team teaching among schools; the expansion of the flexible curriculum high school; a guest speaker program; and a Vocational Information Center.[54]

The Northside Parents were not pleased with that portion of the Board's proposed plan which addressed curriculum improvements, and felt it was an inadequate response to Paragraph 10c. of the consent decree. (Unlike the Magnet School Program, which had necessarily (to meet ESAA requirements) been a product of citizen and community involvement, the Board drew up its curriculum improvement proposal without any community input.) The Board suggested that the Danforth Foundation be called in again with a body of independent consultants, to come up with a plan more satisfactory to the plaintiffs. This was done, and all parties agreed to the resulting plan.[55]

All the while, the Board awaited news as to the requested ESAA funding for its proposed magnet school program. The first word it received came when the U.S. Office of Civil Rights moved to disqualify the St. Louis school system from receiving the $3 million-plus it had requested. HEW honored the Office of Civil Rights' request, the points at issue being a Board policy that effectively permitted white students to transfer from heavily black schools, and the absence of black children in any of the school system's classes for gifted children.[56] The Board called a special meeting and agreed to revise its policies on both counts.

Late in the summer, HEW granted the School District a waiver and awarded it approximately $2 million in ESAA funds.[57] The Board supplemented this with a share of the District's own funds, and began operation of the Magnet School program in September 1976. When the school year began, there were about 2,400 students in ten magnet and alternative school sites. While community support for the Magnet School program was strong, the National Education Director of the NAACP criticized the small number of students involved in the program and charged that it was simply a method of delaying meaningful desegregation.

Meanwhile, in May of 1976, the NAACP had asked an Eighth Circuit Court of Appeals to allow it to intervene immediately so that it might influence court-supervised desegregation plans for the school year beginning in September. The Appeals Court denied the request without comment in June.[59] In August, the association filed its brief as part of the regular appeals process. In the brief, the NAACP suggested that the plaintiffs had acquiesced partly because McDuffie and Russell had obtained a court order requiring the Board to pay their fees, and the two attorneys, "their fee in hand, [were] content to abandon" the parents' original request for system-wide desegregation.[60] The NAACP maintained that Judge Meredith's comments to the press--that the consent decree "does not and will not include busing"--indicated a predisposition against busing on his part. The brief also charged that Meredith had erroneously approved the consent decree because school officials threatened that they would lose federal money otherwise.[61]

In December, nearly a year after the consent decree was entered, attorneys for the School Board, Northside Parents, and the NAACP presented oral arguments before a three-judge panel of the Court of Appeals. While the hearing was supposed to be confined to one narrow issue--whether the NAACP should be permitted to intervene--much of the discussion focused instead on busing. Judge Donald P. Lay was particularly sympathetic to the NAACP's arguments. Lay declared that the plan failed to meet constitutional standards for desegregation. As the St. Louis Post-Dispatch reported:

> The judge said he was astonished that the plan included mandatory provisions only for transferring teachers and for establishing magnet schools to draw students from the entire school population--and no required shift of students.
>
> "I fail to see any...responsible form of integration of the schools" in the order, Lay said. "You have settled for separate but equal--isn't that a fact?" he asked Joseph S. McDuffie, an attorney for the Concerned Parents of North St. Louis.[62]

McDuffie denied that the plan would perpetuate segregation, and said that "[T]here would eventually have to be a break in the tightly-woven school attendance zones in the black community"--specifically, drawing of zones along north-south instead of the existing east-west lines. Judge Myron H. Bright asked McDuffie whether "your group is committed to the idea of the greatest amount of desegregation possible." McDuffie replied, "Absolutely." He said that although the consent decree did not mention busing, there would eventually have to be some.[63]

Two days later, on December 13, the Court of Appeals granted the NAACP's petition to intervene.[64] Judge Lay delivered the opinion: Judges Bright and Talbot Smith (Senior District Judge, E.D. of Michigan, sitting by designation) concurred.

The Court first considered Meredith's ruling of "untimeliness"--to which the NAACP offered four arguments: First, the association had agreed with the initial claims asserted by the original plaintiffs. Second, it was in agreement with the stipulated facts of the case, and did not desire to relitigate or undo those facts. Third, there was considerable delay from the time the suit was filed (February 1972) until the time the consent decree was entered (December 1975), resulting from a stalemate between the parties as to how to achieve a desegregation plan. Fourth, the District Court had, as of that "late date," only partially approved specific plans for desegregation. The Appeals Court found the arguments persuasive:

> Considering all of these circumstances, and in view of the fact that only partial steps toward implementing a unitary school system have taken place, we find the district court erred in denying the petition for intervention for lack of timeliness....unfortunately it is readily apparent that the complete desegregation plan is still on the drawing board. The record demonstrates that the effects of the previous de jure school segregation are still fully visible within the St. Louis school system.[66]

Next, the Appeals Court considered Meredith's finding that the Northside Parents adequately represented the NAACP's interests. The Court overturned the finding, noting that as late as September, 1974, the parents group (original plaintiffs) proposed findings of fact and conclusions of law consistent with the NAACP's claims. The Court quoted from plaintiffs' 1974 document:

> ...that this court require the defendants to prepare and submit for approval of this court a plan for the operation of all the public schools within the defendant Board of Education school system in conformity with the requirements of the Fourteenth Amendment, including, but not limited to, the non-discriminatory allocation of financial and physical resources; the establishment of school geographical boundaries which are not racially identifiable; the location, construction and utilization of new buildings and the utilization of existing school buildings in a manner which are (sic) not racially identifiable; the assignment of pupil populations, staffs, faculties, transportation routes and activities which are not racially identifiable; and that the plan be effective at the earliest possible date.[67]

With language that reflects a considerable backing-off from Lay's tone in oral argument, the opinion affirmed the good faith of everyone involved in drawing up the consent decree:

> In finding that intervention should be allowed, we do not in any way impugn any element of bad faith to the original plaintiffs or the school board by their agreeing to the consent decree. We are confident that all the parties, as well as Judge Meredith and the community at large [footnote omitted], have strived in good faith to find a workable solution to the difficult problem before them.[68]

While declining to consider formally the merits of the decree, the Court left little question as to its position. First, the Court observed "that if the plan to be submitted by the Board contains major deficiencies in the respects asserted, the plan will encounter serious constitutional objection."[69] A footnote to that observation is particularly enlightening:

> Great stress has been placed by the parties in achieving and improving the quality of education within the St. Louis Schools. Although efforts to improve the quality of education for all students is desirable, this emphasis fundamentally misapprehends the constitutional requirement of achieving a unitary school system. The achievement of quality education is not premised on the equal protection clause of the Fourteenth Amendment. Prior to Brown...it had been urged that quality education could be made available to all students without integration. Separate but equal concepts have now long been rejected. Federal courts lack jurisdiction under the Fourteenth Amendment to require quality education in state school districts other than to erase the effects of prior school segregation. The sole goal of Brown is to erase the dual educational system and achieve unitary schools. Recognition of equal protection principles under the Fourteenth Amendment is focused on achieving a society that is not divided by skin color...and to this end it is important that black and white children accept one another at an early age...Segregated school systems have undoubtedly resulted in a loss of equal opportunity for quality education for all students. However, it is the "equal opportunity," not the quality education which is germane to the constitutional concern.[70] . (citation omitted)

Second, the Court noted that an ultimate Board plan which had the major deficiencies described in the NAACP's objections would fall short of the desegregation plans now required for Atlanta and Detroit. After discussing those two cities' plans briefly, the Court concluded:

> The study of these two desegregation plans reveals that under those circumstances complete integration was impossible. Both plans necessarily left several all black schools. Yet such studies disclose that district courts and school boards, facing more difficult problems than presently confronting the St. Louis system, are using every effort possible to achieve desegregation of prior de jure school systems. It should be obvious that anything less than similar efforts in St. Louis would fall short of constitutional requirements.[71]

Finally, the Appeals Court suggested that Meredith invite the U.S. Department of Justice and the Missouri State Board of Education to intervene. The Court recommended that the parties explore the creation of a bi-racial citizens committee, and that they investigate the voluntary cooperation of the County in accepting minority transfers. The Court also directed that, before approving the Board's plan, Meredith require the parties to submit alternate plans.

When the NAACP received word of the favorable ruling, it announced that it would study all options for desegregating the schools, though not dismissing busing. The national headquarters of the association agreed to send a team of desegregation specialists to make specific recommendations. A local NAACP attorney remarked about that, "...desegregation (of a school system) is not something to be worked out by lawyers, but by educational experts and statisticians."[72] In response to Superintendent Wentz's comment that it would take massive busing to give each school a 70-30 black-white mix, the NAACP said it was not seeking any such thing, since strict ratios had previously been struck down by the courts.

Two weeks later, the Board requested the Court of Appeals to reconsider its December 13 ruling, stating that the decision to let the NAACP intervene was contrary to December 7 Supreme Court ruling involving the Austin, Texas schools. In that case, the High Court held that court-imposed desegregation plans could be used only to cure deliberate constitutional violations by school officials. The Board contended that it had committed no such violations, and that the December 13 opinion erroneously stated that the St. Louis schools were de jure segregated.[73]

When the December 13 ruling was issued, Mrs. Liddell told reporters that the NAACP intervention in the case was probably a good thing, since "[i]t puts a lot of pressure on the School Board because a lot of people will be scrutinizing what they're doing."[74] Nevertheless, the parents group joined the Board in seeking to void the December 13 ruling. The group stated in its brief that the Appeals Court ruling was confusing, since it implied that the NAACP should replace the Northside Parents as the spokesman for black parents in the suit. The group asked for clarification on that issue. The group also agreed with the School Board's brief that the Appeals Court went too far in discussing the merits of the consent decree without allowing both sides to present their arguments.[75]

A series of legal rulings and petitions followed in the early weeks of 1977. First, the Court of Appeals denied the Board's request for a rehearing. Bolstered by another Supreme Court ruling that discriminatory intent must be proved before a court may order a remedy, the Board decided to seek a High Court review of the Appeals Court ruling. The Board requested a temporary stay from the December 13 ruling while the Supreme Court decided whether to review the case, but was denied. Chief Judge of the Eighth Circuit, Floyd R. Gibson, also reported the results of a poll of the Court's eight judges; five voted to uphold the December 13 ruling, while only three (Gibson, William H. Webster and Roy L. Stephenson) voted to reconsider it.[76]

On February 2, the Board formally asked the Supreme Court to review the Appeals Court's decision which (1) allowed the NAACP to intervene, and (2) called into question the constitutionality of the consent decree. Three weeks later, by a 4-to-4 vote (with Thurgood Marshall, longtime attorney for the NAACP, not voting) the High Court refused to delay the effect of the December 13 ruling.[77] The Board announced that it still intended to request the Supreme Court to review the merits of that ruling.

An important factor in the Supreme Court's decision was probably a document which the Northside Parents filed, at Justice Blackmun's request, stating that any appeals should be denied because "schedules contained in the consent judgment and decree have not been faithfully followed." The document also stated that policies adopted in the past indicate that the Board was "intentionally maintaining a segregated school system..." The document specifically accused the Board of reneging on promises to change attendance zones for elementary schools. Mrs. Liddell told reporters:

> It may not be in the consent decree, but they agreed to do it. We feel that the school board is attempting to back away from some of the things that were discussed and agreed upon.

One school official remarked, "I think the NAACP got to the parents."[78] But both Mrs. Liddell and an NAACP spokesman said no consultation had occurred.

Joseph McDuffie later explained the shift in the parent group's position as involving the two issues of liability and remedy. During the early efforts of the NAACP to intervene, the association was, in effect, asking to open up the question of liability on the part of the Board, McDuffie said. The parent group was opposed to doing that. Eventually, the NAACP narrowed its goal to intervention on the question of remedy, and at that point, the parent group joined the association's cause.[79]

McDuffie also commented on the omission of any reference in the consent decree to changing elementary school attendance zones. He stated that the omission was a "typographical error or just a careless mistake."[80] Russell offered a similar explanation. Recalling how the attorneys had all worked around the clock to draw up the consent decree, Russell said, "I guess we just got sleepy."[81] McDuffie said that everyone knew you couldn't desegregate without redrawing elementary school attendance zones. The plaintiffs talked about it; the Board talked about it; it was clearly to be part of the plan. McDuffie also said that he thought the Board would have conceded that point, and would have corrected the omission, had the NAACP not intervened and positions solidified.[82]

The defendants do not agree. Superintendent Wentz said that the omission was in no way accidental. That, in fact, was the key thing that made the consent decree acceptable to the Board. Wentz noted that you can't just redraw elementary school boundaries. You also have to move the kids. But that takes busing, and it was precisely that which the Board was unwilling to do.[82a] Rava agreed. "The consent decree speaks for itself." If McDuffie and Russell had wanted busing, which redrawing elementary school attendance zones necessarily implies, the Board would never have agreed, Rava said.[82b]

On February 28, a week after the Supreme Court's decision to let the NAACP intervene, the Board received another setback when it filed its report to the Court in response to Paragraph 9 (reducing racial isolation of the high schools) of the consent decree. The report proposed a four-year plan to desegregate by establishing a junior high school system. Specifically, the Board's February Plan called for the creation of three junior high schools per year, with enrollments of equal racial composition, so as eventually to reduce racial imbalances at the ten neighborhood high schools. The three sites chosen for the first year included two near the downtown area and one in the west end, with approximately 2000 seventh, eighth and ninth graders enrolled.[83]

The plan also proposed enlarging the magnet school program, improving the curriculum at all high schools, modifying some high school attendance boundaries, and making the technical high school a fulltime vocational school. The first-year cost was estimated at $2,500,000, most of which the Board hoped to get from the federal government. But the report emphasized that the only viable way to achieve desegregation was through a metropolitan plan, encompassing the neighboring two tiers of the county school districts.[84]

The two black members of the Board argued that the proposed plan was weak, but voted for it to get it before the Court. One of the two described the February Plan as a "feeble attempt" and complained that it didn't involve enough students.[85] Meredith gave the Northside Parents and the NAACP until March 29 to respond to the plan.

The NAACP's reaction was predictably negative. The association expressed doubt that the plan would be effective, and said that attempts at desegregation should start at the elementary level. The group also criticized the plan's focus on a metropolitan solution, stating that that would require a difficult showing of violation on the part of county districts, and that the issue was not the county schools anyway.[86] The original plaintiffs found the plan "so devoid of constitutional requirement as to indicate a lacking in good faith."[87]

The Board's proposed plan also brought angry reaction from some white parents in South St. Louis. One group organized in opposition to an aspect of the plan that would put 125 white students eventually into a high school of 1,750, all black, students.[88] Calling themselves the Involved Citizens Committee, the group proposed a modification to the Board's plan. The Board rejected the modification, stating that it would put the plan in jeopardy. A second group, Concerned Parents for Neighborhood Schools, formed to oppose the "unfair, unreasonable and discriminatory burden" the plan would place on white students who would be transported "into an area that has a higher crime rate and incidence of crime, thus subjecting [them] to the threat and danger of physical violence." Both white parent groups sought to intervene in the case.[89] Meredith denied their requests but granted them each amicus curiae status.

By this point (April 15), the Justice Department was also an amicus curiae. As instructed by the December 13 ruling, Meredith had invited both that Department and the Missouri State Board of Education to intervene. The Missouri Board declined. The Justice Department also declined to intervene formally, stating that the case had progressed beyond the point where the Department could appropriately get involved, but agreed to file an amicus brief.

Meredith's next step was to ask all attorneys in the suit to meet with him in his chambers "to see if there is any common ground on which we may proceed." If no common ground could be found, Meredith said the meeting would be an opportunity "to set a schedule for study, hearings, and other proceedings for the purpose of effectuating a plan of desegregation for the schools..."[90]

Two days before Meredith's scheduled meeting, Democrat James Conway was sworn in as the new mayor of St. Louis. Conway stated in his first press conference that the City would seek to intervene in an effort to protect the interest of city residents and, barring that, would opt for amicus status. "No problem," Meredith said when told of the Mayor's statement. "I've permitted anybody to come into this case as a friend of the court. Certainly, if they're desirous of intervening in that way, all they've got to do is come over and ask me."[91]

When the meeting in Meredith's chambers commenced, attorneys representing eight groups were present: the School Board, the Northside Parents, the NAACP, the two southside parent groups, the City of St. Louis, the Department of Justice, and the Missouri Attorney General's office on behalf of the State Board of Education. The Judge opened the meeting, but then left them alone "to see if they [could] work anything out among themselves." As he left the courthouse, Meredith told reporters that he felt the magnet school program was the only facet of the Board's proposal where there was any possibility for agreement.

Meredith's prediction proved accurate. After two days of meetings, the attorneys could agree only to let the Board expand its magnet and specialized high schools program. Accordingly, on April 22, Meredith issued a ruling which (1) barred the Board from taking further action on its junior high school plan, (2) ordered all parties and friends of the court to submit any alternative plans by May 23 and to prepare for a week of hearings on the issue to begin July 25, and (3) directed the Board to proceed with its Magnet School Program.[93]

Both Meredith and the Board stated that there was no way to get any plan (other than the Magnet School Program) into effect by fall. Nevertheless, the NAACP was "satisfied" that hearings had been set where the group would have a full opportunity to present an alternative plan. McDuffie was also optimistic, predicting that the hearings would produce "a comprehensive desegregation plan."[94]

By the end of May, all of the official parties in the suit, and several of the amicus parties, had drafted formal plans and submitted them to Meredith.[95] The Northside Parents plan eliminated sub-districts and feeder patterns and grouped students by grade level into four tiers--K through 3, 4 through 6, 7 through 9, and 10 through 12. Students at the lowest level would be assigned to schools within walking distance of their homes, with attendance zones drawn to maximize racial integration. At higher grade levels, students would be bused so as to achieve a 60-40 black-white mix in all schools. The plan also called for a desegregation planning group within the school system. The group, comprised of personnel at all levels, would have five primary functions: staff development, administrative reassignment, training and information dissemination for non-professional employees, dissemination of public information, and generation of community support.

The NAACP-submitted plan called for "quality integrated education" through a variety of desegregation techniques--revised feeder patterns, pairing, clustering, and rezoning. The plan proposed that administrative-district lines be redrawn to create five new districts with both contiguous and non-contiguous territory. Both black and white students would be bused, in approximately equal numbers. The plan also recommended that special services--hot breakfasts, free lunches, etc.--be provided at all schools, and that all current, plus some additional, Title I funding follow eligible children to their new schools.

The Justice Department submitted an abbreviated plan, recognizing the short time between the July 25th hearing date and the start of the school year. The plan, which was to be implemented in the Fall of that year, proposed a new set of high school attendance zones. Under the plan, two of the City's northernmost high schools would remain virtually all black. The remainder of the high schools would have enrollments of about 70 percent black and 30 percent white, equivalent to the racial mix for the district as a whole.

The plan submitted by the Involved Citizens Committee reflected the limited interests of the white parent group. The plan was identical to what the group had unsuccessfully proposed to the Board earlier in the year. It replaced one of the Board's proposed junior high school sites with a substitute site; that would in turn allow the students to feed into a majority-white high school rather than the all-black high school as proposed in the Board's plan.

In response to the submission of alternate plans, the Board asked the Court to declare as additional defendants the State of Missouri, the State Board of Elementary and Secondary Education, and the Missouri Commissioner of Education. State involvement was necessary, the Board argued, because three of the alternate plans involved radical changes in the structure of the St. Louis schools, including massive busing.[96]

At the same time that the parties and their attorneys were seeking a legal solution to the desegregation problem, several initiatives arose from the community, directed toward bringing the parties to the suit together, outside of the courtroom, to work in some structured fashion toward resolving the desegregation issue. The first occurred at the close of a forum sponsored by the Center for Metropolitan Studies (Center) of the University of Missouri-St. Louis. Panel members--including Minnie Liddell and Robert Wentz --agreed that they would like to sit down together in good faith and attempt to develop an acceptable desegregation plan. James Laue, moderator and Director of the Center, took responsibility for coordinating such an effort. Laue's attempt to convene the parties broke down in the final stages when the Northside Parents decided that to join in any mediation might weaken their position and tend to place treatment of the desegregation issue on the School Board's terms. Recognizing the merits of the group's position, the Center decided to hold off on any mediation effort until all parties had submitted their alternate plans to the Court.[97]

The second community initiative came in the late summer of 1977, when John Ervin, Vice-President of the Danforth Foundation, undertook to form a community panel that would serve as a conduit for discussion and negotiation between the parties. While Ervin's plan was never announced publicly, panel members included Paul Reinert, Chancellor of St. Louis University, and Leonar K. Sullivan, former Congresswoman from St. Louis. The panel met with all of the litigants and discussed with each the litigant's position on the desegregation issue.[98]

There is also some indication that Civic Progress, a group composed of major corporate officers in St. Louis, also sought to resolve the school issue outside of the courtroom, and began informal discussions with some of the key individuals in the Fall of 1977.[99]

The final episode in the efforts to implement the consent decree began on June 27, 1977, when the Supreme Court issued several key rulings. First, the Court refused the St. Louis School Board's request that it review the merits of the December 13 ruling by the Court of Appeals.[100] On that same day, the High Court delivered rulings on the Dayton[101] and Detroit[102] school desegregation cases. (A ruling on school desegregation in Omaha followed several days later.)[103] Both the NAACP and the Northside Parents hailed the Dayton and Detroit decisions which they felt upheld the broad powers of federal judges to impose specific steps to eliminate desegregation. NAACP counsel Nathaniel Jones said it was not a setback that the Court had rejected the Dayton busing plan, since that ruling did not break any new constitutional ground.[104]

The Detroit decision, which ordered the State of Michigan to spend $11,700,000 on remedial programs for minority students, took on added significance when, on July 13, Meredith admitted the State of Missouri and its chief educational officials as additional defendants. (The NAACP and the Justice Department had joined the School Board in requesting the State's admittance.) Meredith also ruled that the four friends of the court--Justice, the City, and the two white parent groups--would be made additional plaintiffs. One attorney in the case told reporters that when the Supreme Court refused to review the Board's petition to bar the NAACP, Meredith probably felt that the other parties should also be allowed to intervene. [105]

But the real import for St. Louis of the Supreme Court's end-of-June decisions was revealed in another ruling in Meredith's July 13 order:

> In the light of recent Supreme Court cases: [Detroit, Dayton, and Omaha], it is necessary for this Court to determine if there has been a constitutional violation by the defendants. This determination has never been made by the consent decree nor the stipulation of facts, and the stipulation of facts denies any constitutional violation by defendants. All parties are bound by the stipulation of facts and the consent decree. The remedy to be adopted by the Court will depend on the nature and extent of the constitutional violation, if any.[106]

The following day, Meredith delayed the hearings scheduled for July 25 until October 17, in order to give the State time to prepare for trial as a codefendant. He scheduled a place and time prior to the trial for attorneys to meet in order to execute stipulations and agree on the authenticity and admissibility of documents, exhibits, and depositions, and instructed parties "to limit the trial time in all ways possible." With what has since proved to be a highly optimistic estimate of its duration, Meredity directed that the "[t]rial will be commenced on October 17, 1977, and concluded on or before Friday, October 28, 1977, and will be in session on the holiday of Monday, October 24, 1977."[107]

V. The Trial

When the trial opened on Monday morning, October 17, the courtroom was jammed with participants, not to mention the spectators. More than fifteen lawyers were present on behalf of the five plaintiffs, four defendants and one amicus curiae.* Cardboard boxes, containing more than 1200 documents and exhibits, were wheeled in by the cart-load and stacked around the wood paneled walls of Judge Meredith's courtroom.[108]

Minnie Liddell's son, Craton, whose name the lawsuit bore, was not among those present. He declined the chance to attend the trial's opening because he had a test in school that day. Craton was a senior at Northwest High School and wanted to become a lawyer. He had been in sixth grade when the suit was filed.[109]

A rash of filings on procedural matters, depositions and witness occurred just before the opening of the trial. Only the State Board as defendant remained relatively silent, taking the position that, since no direct complaint had been filed against it, there was not a lot for it to say.

The NAACP asked Meredith to require the St. Louis School Board to respond to additional interrogatories which the Board said it could not complete before the trial opened. But Meredith denied the request, stating that "the hour is too late and interrogatories are too burdensome."[110] Meredith also held to his ruling that the City and the two white parent groups could participate as plaintiff-intervenors. The Justice Department had argued that they should be dismissed, or else realigned as defendants, since they shared the Board's position that no unconstitutional racial segregation existed in the school system. (The City's position, which Mrs. Liddell called "a slap in the face" of North St. Louisans, underscored the political reality that while blacks accounted for 73 percent of the pupils in city schools, the City's electorate had a white majority.)[111]

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*See Appendix E for a listing of the parties and their legal counsel.

Meredith directed that the trial would cover the issues of liability and remedy simultaneously. This is in contrast to the bifurcated approach typical of most school desegregation cases, where the issue of remedy comes up only after (and if) the judge has made a finding of de jure segregation. Attorneys had originally planned to call 120 witnesses. Largely at Meredith's insistence, the list was culled to 65. Also to save trial time, the NAACP, Northside Parents, and Justice Department agreed to a witness-pooling arrangement. Meredith's impatience with the time being consumed by the trial was visible from the start. When NAACP chief attorney Louis Lucas tried to deliver an opening statement, Meredith cut him off, saying: "I don't want to hear a statement. I want to hear testimony." He repeatedly admonished attorneys to "speed things up."[112]

The first two-week segment of the trial was devoted to a series of witnesses called jointly by the NAACP, Northside Parents, and Justice Department. The testimony focused on two topics: (1) the relationship between racial population trends and school attendance boundaries, and (2) School Board policies and practices pertaining to race.[113] William Lamson, a demographer hired by the NAACP, used a series of maps to show school attendance boundaries just after Brown in 1954, and the annual adjustments made in those boundaries up until 1977. Lamson's testimony showed an expansion of the boundaries of all-black schools in the direction of black population movement, with a simultaneous contraction of white school boundaries.[114]

Most of the testimony on School Board policies came from a former Superintendent, William A. Kottmeyer. Consistent with the Board's main line of defense, Kottmeyer maintained that segregation in the schools was the inevitable result of housing patterns and other socio-economic factors over which the Board had no control. Kottmeyer defended a variety of practices as being in keeping with the Neighborhood Schools Concept and with the Board's post-Brown directive of "maximum integration within sound educational practices." He justified the Board's policy of "intact busing" on the grounds of schedule conflicts between the black classes that were bused and the white receiving schools.[115]

The trial recessed at the end of the second week, and resumed for another two-week segment beginning December 5.* The NAACP compared the relatively high annual per pupil expenditures for busing in the St. Louis City school system ($360) to comparable figures for St. Louis County ($94) and Dayton, Ohio ($125), in an effort to show that the Board was inefficient in handling financial matters.[116] Then, attention turned to the remedy aspect of the suit while Michael Stolee, Dean of the School of Education, University of Wisconsin at Milwaukee, described the NAACP's revised plan which he had authored. The plan would involve busing about 23,000 of the city's 77,000 public school students, in addition to pairing and clustering of schools and other desegregation techniques. Stolee also addressed himself to the general issues of white flight, tipping point and contact theory.[117]

Superintendent Wentz testified several days later, expressing doubt that a "pairing and clustering" method would work given the nature of housing patterns in St. Louis.[118] Wentz's testimony also revealed for the first time the existence of an alternate (to the Board's February) plan, prepared at Wentz's directive by Stephen Daeschner, who was then Director of Evaluation for the school system. Daeschner prepared the plan in response to a confidential memo from Wentz requesting a study for "a solid, viable alternative" to the Board's February plan.[119] Daeschner, about to leave to take a position with the Anchorage, Alaska public schools, spent only about a week on the plan. (He had reportedly resigned after not being selected to head the Magnet School program. Daeschner proposed the establishment of 16 junior high schools serving 7th and 8th grade pupils, all but one of which would have a majority-black enrollment. All ten of the City's academic high schools would also be more than 50 percent black. The proposal would place every student in the public school system in an integrated setting some time between the 7th and 12th grades, and would also break the Board's historical practice of never busing white students from South St. Louis to northside schools.[120]

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*This became the pattern of the trial: two weeks of hearings, followed by several weeks of recess and then another two weeks of hearings, etc. The recesses were necessary to give Meredith an opportunity to catch up on his criminal trial docket. Under the Speedy Trial Law, felony cases must be tried within 90 days.

School officials unsuccessfully tried to keep the Daeschner proposal secret, maintaining that it was a "very rough draft" and would be misinterpreted and lead to "unnecessary anxiety in the community."[121] Wentz stressed that the "secret plan" was only a study that had not been reviewed by administrators nor discussed by the Board. He held a press conference to "clear the air on the issue" where he explained that the main thrust of the Daeschner proposal was to establish a 7th and 8th grade junior high school pattern, rather than the 7th through 9th grade system proposed in the February Plan.[122] (Objections to that aspect of the Board's plan had pointed out that certification requirements differ for 7th and 8th grade compared to 9th grade teachers, and that 9th grade curricula require labs and other facilities not needed for the lower grades.) Wentz also stressed that the Daeschner proposal called for no more busing than the Board's February Plan would require at the end of four years.

Daeschner himself came in from Alaska to testify during "Round Three" of the trial--another two week segment of testimony beginning February 5, 1978. Attorneys for the NAACP and Northside Parents tried to show that the Daeschner proposal was very similar, except for cost, to their own plans--both of which the Board criticized as unfeasible. Moreover, the attorneys argued that Daeschner's cost figures were inflated. Daeschner testified that he felt his proposal satisfied Wentz's request for a "solid, viable alternative," however, he later contradicted himself and said he could not vouch for the "viability" of the plan.[123]

Also testifying on the question of remedy was David L. Colton, Director of the Washington University Center for Educational Field Studies, and author of the plan submitted by the Northside Parents calling for a four-tier grade structure. While Colton maintained that the plan could eliminate overcrowding and reduce both transportation and operational costs, attorneys for the Board, the City, and the Concerned Parents for Neighborhood Schools questioned him hostilely in an effort to show that the plan was unrealistic and too expensive.[124]

Throughout the hearings, Meredith gave the attorneys and witnesses considerable latitude in their questions and answers. When attorneys occasionally quarreled, Meredith broke in with what one observer described as "common-sense admonitions in 'good 'ol boy' style."[125] He continued to express his impatience with the slow pace of the hearings. He made William Lamson, the NAACP's expert demographer, testify standing up, so that he would not have to keep walking back and forth between the witness chair and his charts across the room. When attorneys asked Superintendent

Wentz a number of questions about which Wentz and other witnesses had already testified, Meredith gave them a gruff warning: "There's no use going over and over the same ground...I am going to cut off some of this."[126] But more often, Meredith's gruffness was couched in good humor. When one witness got up from the stand to unroll some maps, Meredith told him to stay put: "The lawyers can put up the maps for you--we've sure got enough lawyers."[127]

The fourth segment of the St. Louis school desegregation trial began on March 13, following a three-week recess, and lasted for two-and-a-half weeks, when it was recessed until May 8. The entire time was devoted to presentation of the Board's case. Much of the testimony came from academics who/debated the neighborhood school concept and theories of white-flight and the tipping point. Clifford Hooker, a University of Minnesota professor of educational administration, defended the neighborhood school as crucial to education quality and said it was "as traditional in American education as McGuffey's reader."[128] Hooker also testified that the NAACP plan, by requiring massive busing, showed "a gross naievete of ignorance"[129] in not recognizing that it would lead to white exodus "accelerating at a fantastic rate."[130] However, Hooker conceded that if the Board was found guilty of intentional segregation, court solutions should be "blind" to speculation on white flight.[131]

Another expert witness branded government-sponsored programs as highly responsible for the continuation in St. Louis of segregation in housing, economics and education.[132] The former Mayor of St. Louis testified briefly to make a plea that "practicalities rather than theory prevail" and to argue for a metropolitan desegregation plan.[133]

The Board ended its case with the testimony of Daniel Schlafly, 25-year member of the Board and four-time president. Schlafly, whose testimony focused primarily on the question of the Board's intent to discriminate, maintained that "we did the best we could." "We had some very difficult circumstances over which we had no control," including the fact that the city was separated from the county, a declining tax base, federal housing policies that contributed to segregation and "the lack of any substantive help--really any help at all--from the state or federal government."[134]

Schlafly denied that the Board's school construction policies were designed to "contain" blacks in North St. Louis. He argued that the 1962 bond issue, which financed construction of a number of new schools, received its strongest support in the black wards and would never have passed had the Board not promised to locate the schools in overcrowded neighborhoods in predominantly black areas.[135] Schlafly argued that some schools were built with Title I funds, and that federal regulations required that the schools be placed where the children were--a fact which Justice Department attorney J. Gerald Hebert later disputed.

Schlafly attributed racial isolation in the St. Louis schools to "massive" population shifts, and the more than doubling of the percentage of blacks in the system. He said these shifts "almost overwhelmed the School Board." "We've lived demographics since 1955. For 15 years, we were fighting just to keep our heads just above water."[136]

James McDuffie asked Schlafly whether he didn't think the Board's policy of intact busing was a "minus" to the Board's alleged goal of integration. Schlafly conceded that it probably was, but that it was also a "plus" in that the black children got to take advantage of the resources and general environment of the white school. McDuffie responded: "Even if they are given a separate recess period, so that they don't have to share the playground with the white children? Even if they are assigned a different lunch period, so that they don't have to share the lunchroom with the white children? Do you consider that a plus, Mr. Schlafly?"[137]

Several hours later, the Board rested its case.

VI. Looking Ahead

Because of prior commitments in April, Meredith recessed the trial until May 8. Only the City and the Concerned Parents for Neighborhood Schools* still have their cases to present. This is expected to take about eight days. In anticipation of the conclusion of testimony, Meredith instructed attorneys to begin preparing final arguments: "I want those briefs to be very, very specific. I don't want to have to dig through all this record to recheck every point."[138]

Meredith told the attorneys that the briefs should address three principal questions (quoting from the Post-Dispatch summary of what Meredith said):

1. Whether the segregation that exists in the St. Louis public school system is an outgrowth of natural forces at work in the community or the result of specific actions by the St. Louis Board of Education.
2. What the legal implications would be if Meredith found that the School Board had nothing to do with the perpetuation of segregation in the school system. Specifically, Meredith asked the attorneys to address the question of whether he has the authority to order a desegregation plan if he finds the School Board innocent of maintaining a segregated system.**
3. Whether the desegregation of city schools is a practical possibility.[139]

Meredith emphasized the practicalities of the issue (question #3): "Based on the facts before us, can you desegregate the schools in St. Louis--regardless of what you may want to do?"[140]

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* As of November 1977, the Concerned Parents for Neighborhood Schools claimed that they had 1000 families as members, and had received 5,000 contributions totalling $32,000. The other white parent group, Informed Citizens Committee, has not participated actively in the trial, for lack of funds.

** More specifically, Meredith wants to know whether the consent decree could be enforced if the Board is found innocent.

Meredith stressed practicalities in comments during a personal interview as well.[141] "When you look at the cities where the federal courts have ordered desegregation, what in the hell have they accomplished?" he asked. He said he felt the courts' efforts had often been futile, even counterproductive. "And, I'm not about to engage in an exercise in futility at great expense to everyone," referring (seemingly) to the expense of a long trial and the cost of desegregation steps that merely lead to white flight. "It's clear to me that when an area is 70 percent black, before long it's 90 percent black."

But what about higher court precedent as to what a district court judge can do? "There's an old saying," Meredith responded, "that the Supreme Court follows election returns. That's not entirely true, but there's something to it." The Supreme Court has--he made a flip-flop motion with his hand.. The Supreme Court sees when what it's doing is futile, and it's taking a much tougher stand (on school desegregation cases). "The fact that the Court split 4-to-4 just on the question of NAACP intervention (in the St. Louis case) shows that."

Meredith feels sure the St. Louis school desegregation case will go to the Supreme Court, whatever decision he makes. This case will make new law, he predicts, since there are so many novel legal aspects to it. (One School Board member who has been attending the trial regularly suggested that Meredith's expectation of an appeal is one reason he is impatient with the slow pace of the trial. When attorneys try to have material read into the record, Meredith tells them, "Just enter it into the record. The boys upstairs (in the Court of Appeals) can read.")[142]

The attorneys agree that the case will not be settled when Meredith rules this time around. Dr. James DeClue, Education Committee chairman for the local NAACP, told reporters before the trial even began, "It's almost as if the lawyers were preparing their cases for the appeals court." Several of the attorneys later confirmed the truth of that observation. Some of them feel that Meredith is very biased toward the School Board. For scholarly support they cite a recent St. Louis University Law Journal "Public Interest Law Note" (1977) which concludes that Meredith and the other federal judges in the Eastern District of Missouri are "conservative" on civil rights matters.[144] *

McDuffie and Russell don't necessarily share that view, and feel that Meredith has always been very fair and good to them. As an example, Russell describes how understanding Meredith was of the Northside Parents' financial

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* After discussing Meredith's handling of the City school desegregation case in particular, the Note concluded:

> The long delay in implementing school desegregation in St. Louis and the unusual step taken by the Eighth Circuit in criticizing the merits of the consent decree on an interlocutory appeal and in directing the district court to take a number of specific actions to speed up school desegregation, illustrates the adverse impact a district court judge can have on efforts to eradicate constitutional deprivations if the judge fails to assume an active role in directing the litigation toward a prompt and constitutionally acceptable resolution [footnote omitted], at 400.

However the Note has received sharp criticism (by, among others, a former chairman of a midwest chapter of the NAACP), particularly for methodological flaws--e.g., looking only at appealed decisions which resulted in published appellate opinions, rather than the full set of district court civil rights decisions; and ignoring appellate rulings made by district court judges sitting on the appeals court "by designation."

plight, and the long delays that occurred in the original discovery proceedings as a result. Whereas, Russell notes, "Meredith could have thrown the case out any number of times for failure to prosecute."[145]

Nevertheless, there is a feeling on the part of all of the attorneys that the Eighth Circuit Court of Appeals would be more sympathetic to the opponents of the Board. That Court, which is literally "upstairs" from Meredith in the U.S. Courts building, is regarded as one of the more "liberal" appeals courts. Moreover, Judge Lay's December 13 opinion left little doubt as to where he stood on the case, and five of the eight appellate judges later voted to let the opinion stand.

Meredith's previous record on school desegregation suits, however, would not necessarily be cause for optimism to a school board. (One of the Board attorneys said that when the case was assigned to Meredith, he felt neither advantaged nor disadvantaged by having him as the judge) The current school desegration case is Meredith's third. His first was Charleston, Missouri, a small town in southeastern Missouri not far from Meredith's home town. "I integrated those schools with one whack and nobody could do a god-damn thing about it," Meredith said. He went on to recall how the Charleston politicians had come to him earlier saying that if they desegregated voluntarily, they'd never get reelected. So Meredith ordered them to integrate the schools. (Meredith didn't mention that Charleston is the home town of Democrat Warren Hearnes who was Missouri's Secretary of State in 1963 and elected Governor the following year.)

"Then I had this little Kinloch case," Meredith said, referring to a four-year suit involving three St. Louis County school districts, one of which is the fourth largest district in the state.[146] "I found a rather weak constitutional violation on the part of one district. But I was affirmed." In that suit, Meredith ruled that the all-black Kinloch District was unlawfully segregated as a result of the formation of the Berkeley School District in 1937. Meredith ordered that both Kinloch and Berkeley be annexed to the Ferguson-Florissant School District. While the record did not show that Ferguson-Florissant had actively participated in the creation of the segregated Kinloch District, Meredith ruled (and the Court of Appeals affirmed) that Ferguson-Florissant had allowed the segregation to perpetuate.

By annexing Berkeley and Kinloch to the very large Ferguson-Florissant District, Meredith's order achieved a consolidated district with less than 20 percent blacks. Community resistance to the order has been relatively mild, compared to what court-imposed plans in many cities have faced. Meredith is eager to release the case from court monitoring, but the Justice Department has asked him to maintain minimal supervision for a while longer.

The County school desegregation suit would seem to satisfy one of Meredith's main criteria for a decision. When asked whether it was important for a decision to be politically acceptable, Meredith said that he had long ceased to care what people thought about his decisions, in that sense of the word "political." "But is it (meaning a remedy) going to work, is a very important consideration."

Meredith's emphasis on practicalities (Is it going to work?) would seem to have its limits. Asked whether he makes any effort to understand the politics of the school district involved in a remedy, he responded with an emphatic "No"--as if to say "Balderdash." As for the practice of bringing masters into school desegregation cases--if nothing else, as a way for the

Court to maintain its "disinterested" position--Meredith said he didn't believe in it. "The Court has to take responsibility for its [illegible] decisions." His full answer suggested something of an old-timer who has been shown some new-fangled invention that he wants no part of. Meredith responded in a similar tone when asked whether he talked with other judges about school desegregation cases. "No," he said emphatically, implying that he had to make the decisions and take the responsibility himself.

Meredith was quite willing to take the responsibility for a decision in 1975, before Rava, McDuffie and Russell came to him with their idea. He wasn't particularly eager to have the lawyers negotiate about the consent decree. But then, he said, "I decided it was worth a trial."* He said he thought the consent decree would prevent the indignation that comes from imposing a court-ordered remedy.

That last statement--indicating that he had planned to impose a desegregation remedy--seemed to imply that the opinion Meredith never wrote in 1975 would have gone against the Board. (Did Meredith realize that he had indirectly revealed such a well-kept secret?) But he later indicated that there was no need for him to make a determination of guilt at that time. It was only now, in light of Dayton, Detroit and Omaha, that such a determination was necessary in order to impose a remedy. (Many people would argue that even in 1975, such a determination would have had to be made. One of the Board attorneys said that that was certainly his understanding of case law, and

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* Meredith's use of the word "trial" is ironic, given the present status of the suit. The Judge had no comment on the suggestion that an "unequal bargaining situation" may have existed between the two powerful, well-financed School Board attorneys on the one side, versus the inexperienced, underfinanced black attorneys on the other.

That is one of the questions (#2) that he has asked the attorneys to brief.

If Meredith rules in favor of the Board, the Board may really end up losing. Superintendent Wentz offered that as a possibility, explaining that if the Board "got off," the State would also be free of any obligation to help the St. Louis school system desegretate--unlike what happened in the Detroit school case. (However, Wentz said he still hoped the Board would be found not guilty, since that would attach a stigma to it that was difficult to remove.)[147]

Might not a ruling like that in Detroit, then, be one way to get around the likely answer to Meredith's question #3--Is desegregation a practical possibility? Meredith said "the $64 question here is--to what extent is the State of Missouri responsible for local schools?" True, the St. Louis school Board is technically an arm of the State. But just what does that mean in terms of the state's financial responsibility for the St. Louis school system. Each state constitution is different. Missouri may be very different from Michigan. This is a question which Meredith says the lawyers will have to brief.

Meredith also brought up the issue of a metropolitan solution, but said that "that's a different lawsuit." When Meredith denied the Board's request to name 21 County districts as co-defendants, the motion was premature. At that time, there was no constitutional requirement that they be made defendants in order to be brought into the remedy later on.

According to several of the attorneys in the case, Meredith has said he will not handle the case on (the inevitable) remand. He is 64 now, and plans to go on senior status, giving him the freedom to decline further handling of the case. Nevertheless, he takes the case extremely seriously.

"The future of our cities is at stake" in these school desegregation cases. "Schools are a very important factor. They have a great effect." Meredith left little doubt that the "effect" foremost in his mind was the exodus from St. Louis of whites as the city's schools become increasingly black.

As the attorneys approach a legal resolution of the case, community groups in St. Louis are working to prepare the City for possible court-ordered desegration. In January, the National Conference of Christians and Jews sponsored a one-day conference to explore how religious groups could encourage a peaceful community response to desegregation implementation. A short time later, the Danforth Foundation called a meeting of about 40 community representatives to consider setting up a citizen coalition for orderly implementation of any court-ordered plan. The Foundation's action followed from a recommendation by the panel of community leaders that had been meeting with the various litigants in an unsuccessful attempt to mediate the settlement. The current School Board president, Henry M. Grich, Jr., was unsupportive of the Foundation's most recent effort: "I don't know what purpose the meeting could serve at this time. If they're trying to get the community involved in desegregation, it's working in the dark without a judgment from the court."[148] However, Superintendent Wentz attended the meeting and indicated his support. Wentz suggested that they study closely how other cities undergoing desegregation were faring. Soon after, the Danforth Foundation financed trips by citizen groups to observe desegregation in Dallas and Columbus, Ohio. The groups included, among others, members of the School Board, the Northside Parents, and the white, southside group--the Concerned Parents for Neighborhood Schools.

The Center for Metropolitan Studies is also continuing its efforts to stimulate community involvement in the desegregation issue. In the event that Meredith finds the School Board guilty of de jure segregation, the Center hopes to have the remedy arrived at through a process of negotiation between all of the parties (with Court supervision). The alternative--a remedy formulated strictly by the Court--would sacrifice educational quality and political viability, the Center believes. Representatives from the Center provided technical assistance in implementing the consent decree. They have monitored the trial continuously, providing factual summaries of that proceeding as well as the events that led up to it. Most recently, the Center published a detailed proposal for a remedy-through-negotiation process, with the Center to serve as the mediating body. The Citizens Education Task Force, a "blue-ribbon committee" created jointly by the Board of Alderman and the Board of Education, has also proposed that it serve as the mediator should there be a negotiated-remedy process. Meredith has given no indication of his reaction to either group's proposal.

Meanwhile, some of the parties to the suit communicate informally with one another. In early April, one of the Northside Parents hosted a meeting attended by members of the white parent group as well as the Board. The parents met to discuss problems associated with the teacher transfer provision of the consent decree. (The decree required that 10 percent of the staff in every school be minority by the first year of implementation, with that figure increasing to 20 percent this year and 30 percent next year.) That provision was implemented fairly smoothly last year and this. However, the parents anticipate considerable difficulty in achieving next year's 30 percent requirement, particularly with respect to teachers for the special training programs. Many of the parents feel that some modification of the requirement might be beneficial to all.

One School Board member said that the parents would communicate more, except that the lawyers keep them apart. "Still," she said, "we manage to talk on the telephone, and get together at one another's homes. Otherwise, amidst all the courtroom battling, we tend to forget the most important part of all of this--the kids."[149]

VII. Epilogue

The hearings resumed on May 8 and ended May 26--for a total of thirteen weeks of hearings.* Nearly eleven months later, on April 12, 1979, Judge Meredith issued his long-awaited opinion, which found in favor of the School Board.** In brief, Meredith concluded the following: First, the 1954-56 desegregation plan which the Board adopted in response to Brown--which essentially extended the neighborhood school policy for whites to include blacks as well--"was effective in disestablishing the dual school system and in achieving a unitary system." By "effective" Meredith referred to the good faith actions of the Board, rather than to any integrative result.

> The Board completely eliminated race as a requirement or a ban to attend any school in the system. . . . Adoption of the neighborhood school policy as to all children . . . resulted in some remaining one race schools. . . . [However, this policy] did not have the foreseeable consequence of bringing about or maintaining segregation. [Thus], this Court finds that the Board's actions with respect to desegregation were taken in good faith and were as effective as practically possible. The duty to desegregate was, therefore, discharged by the Board. (at 1360-61)

Second, given this finding, plaintiffs must bear the burden of proving discriminatory intent on the Board's part (stated differently, having concluded that the duty to desegregate had been discharged by the Board, Meredith felt justified in treating St. Louis as a "northern" rather than a "southern" case).

> In order to find constitutional violation it will be necessary for plaintiffs to establish that the Board's actions or inactions were intended to, and did in fact, discriminate against minority pupils, teachers or staff. (at 1362)

Third, plaintiffs failed to meet their burden of proof that the Board intentionally segregated students.

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*For a description of the May hearings as well as the final briefs and arguments, see Richard H. Patton, "Resolving the Desegregation Issue in the St. Louis Public Schools--Part II," A Report of the Center for Metropolitan Studies, University of Missouri-St. Louis (February 1979).

**469 F.Supp. 1304 (1979).

> Population changes so overwhelmed the actions of the Board, that the Board's actions or omissions to act may not be said to have had the foreseeable effect of causing or maintaining the racial imbalance in the schools. (at 1363)

Fourth, despite the absence of a constitutional violation by the defendants, all parties are bound by the consent decree in which the Board agreed to desegregate the schools wherever possible. (Meredith instructed the Board to solicit assistance from all parties and return to the court within 90 days to supplement the plan previously filed under the consent decree.)

So ended another chapter in the St. Louis school desegregation case. But few people feel it will be the last chapter, and many believe that the case will ultimately be decided by the highest court in the land.

APPENDICES*

A. Population for St. Louis City and County, 1900 to 1970

B. Racial Composition of Individual Schools, 1972-73 School Year

C. Student Enrollment by Race, 1953 to 1978

D. Racial Composition of Teaching Staff, 1962 to 1973

E. Legal Counsel for Parties in the Case

F. Chronology of Legal Proceedings

G. Enrollment Data, 1976-77 and 1977-78 School Years

H. Summary of the Stances of Parties with Legal Standing

I. Interviews

J. Cited References

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*Appendices E through H were taken directly from "Resolving the Desegregation Issue in the St. Louis Public Schools," A Report of the Center for Metropolitan Studies, University of Missouri--St. Louis, February, 1978.

APPENDIX A

Population for St. Louis City and County, 1900-1970

	Population			
	City of St. Louis			St. Louis County
Year	Total	% White	% Nonwhite	
1900	575,000	93.8	6.2	50,000
1910	687,000	93.6	6.4	82,000
1920	772,000	91.0	9.0	100,000
1930	821,000	88.6	11.4	211,000
1940	816,000	86.7	13.3	274,000
1950	856,000	80.8	19.2	406,000
1960	750,000	71.2	28.8	703,000
1970	622,000	59.2	40.8	956,000

APPENDIX B

Racial Composition of Individual Schools, 1972-73 School Year

REGULAR ELEMENTARY SCHOOLS

		PUPIL ENROLLMENT				
Racial Percentage	# of Schools	Black	White	Total	% Black	% White
Less than 90% one race	21	4,929	4,691	9,620	51.2	48.8
90% - 99.9% Black	44	26,263	394	26,657	98.5	1.5
100% Black	48	21,151	0	21,151	100.0	0
90% - 99.9% White	24	311	11,808	12,119	2.6	97.4
100% White	15	0	6,571	6,571	0	100.0
Totals	152	52,654	23,464	76,118	69.2	30.8

ACADEMIC HIGH SCHOOLS

		STUDENT ENROLLMENT				
Racial Percentage	# of Schools	Black	White	Total	% Black	% White
Less than 90% one race	2	2,071	966	3,037	68.2	31.8
90% - 99.9% Black	2	4,705	221	4,926	95.5	4.5
100% Black	3	9,596	0	9,596	100.0	0
90% - 99.9% White	3	448	8,057	8,505	5.3	94.7
100% White	0					
Totals	10	16,820	9,244	26,064	64.5	35.5

APPENDIX C

Student Enrollment, by Race, 1953 to 1978

Year	Black		White		Total
1953-54	31,185	(34.5%)	59,142	(65.5%)	90,327
1962-63	60,109	(54.87%)	49,447	(45.13%)	109,556
1963-64	64,102	(57.0%)	48,259	(43.0%)	112,361
1964-65	67,346	(58.7%)	47,380	(41.3%)	114,726
1965-66	70,360	(60.24%)	46,438	(39.76%)	116,798
1966-67	72,300	(61.6%)	45,042	(38.4%)	117,342
1967-68	73,911	(62.81%)	43,765	(37.19%)	117,676
1968-69	73,408	(63.5%)	42,167	(36.5%)	115,575*
1969-70	73,128	(64.5%)	40,246	(35.5%)	113,374*
1970-71	73,544	(65.4%)	38,862	(34.6%)	112,406
1971-72	73,802	(67.2%)	36,034	(32.8%)	109,836
1972-73	72,448	(68.4%)	33,496	(31.6%)	105,938
1973-74	69,213	(69.3%)	30,620	(30.7%)	99,833
1974-75					
1975-76					
1976-77		(71.0%)		(29.0%)	84,003
1977-78		(73.0%)		(27.0%)	78,852

APPENDIX D

Racial Composition of Teaching Staff, 1962 to 1973

Year	White	Black	Total
1962	1,804 (53.7%)	1,555 (46.3%)	3,359
1970	1,798 (46.6%)	2,060 (53.4%)	3,858
1971	1,823 (45.7%)	2,164 (54.3%)	3,987
1972	1,837 (46.4%)	2,128 (53.6%)	3,965
1973	1,638 (44.4%)	2,052 (55.6%)	3,690

Appendix E

Legal Counsel for Parties with Standing in the Case*

1. Concerned Parents of North St. Louis (Liddell, *et al*), original plaintiffs:

    Joseph S. McDuffie
    William P. Russell

2. St. Louis Board of Education, defendants:

    John H. Lashly
    Paul B. Rava

3. National Association for the Advancement of Colored People (Caldwell, *et al*), plaintiff-intervenors:

    Louis R. Lucas
    Richard Fields
    Barbara B. Dickey
    Forriss D. Elliott
    David A. Lang
    Nathaniel Jones

4. Civil Rights Division, United States Department of Justice, plaintiff-intervenor:

    J. Gerald Hebert
    W. Jerry Johnson
    Thomas Yannucci
    Drew S. Days III (Assistant Attorney General for Civil Rights)
    Jean C. Hamilton

5. Concerned Parents for Neighborhood Schools (Adams, *et al*), plaintiff-intervenor:

    Anthony J. Sestric
    Leo Garvin

6. City of St. Louis, plaintiff-intervenor:

    Charles Kunderer
    Jack L. Koehr

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*Principal trial attorney's name appears first.

7. Involved Citizens Committee (Puleo, et al), plaintiff-intervenor:

Robert J. Koster

8. State of Missouri, co-defendant:

Sheila Hyatt

Appendix F

Chronology of Legal Proceedings

February 18, 1972	Suit filed by Concerned Parents of North St. Louis (Liddell, *et al* vs. Board of Education of the City of St. Louis).
December 24, 1975	Judge Meredith issues Consent Decree.
December 13, 1976	NAACP admitted to case as plaintiff-intervenor by Eighth Circuit of U.S. Court of Appeals.
February 28, 1977	School Board proposal for reduction of racial isolation in the high schools submitted.
April 21-22, 1977	Meetings of counsel called by Judge Meredith seeking "common ground" under Consent Decree.
July 13, 1977	Judge Meredith issues order finding need to determine constitutional violation and setting trial date.
July-August, 1977	Parties with status as *Amicus Curiae* granted standing as plaintiff-intervenors; State Board of Education, State Commissioner of Education, and State of Missouri named as Co-defendants.
October 17, 1977	Trial proceedings to determine if St. Louis school board has been guilty of constitutional violation begin.

Appendix G

Enrollment Data-St. Louis Public Schools

	School Year	
	1976-77	1977-78
Total Enrollment	84,003	78,852
Racial Composition:		
Black	71%	73%
White	29%	27%
Magnet School Enrollment	2,262	3,680
Racial Composition:		
Black	56%	66%
White	44%	34%
Magnet School Enrollment as percentage of system total	2.69%	4.66%

Appendix H

Summary of the Stances of the Parties with Legal Standing in the Case

1. Concerned Parents of North St. Louis

It is the contention of this group, as the original plaintiffs in the case, that their children have been the victims of discriminatory racial practices and that the 14th Amendment of the U.S. Constitution has been violated. Concerned with securing quality education for their children, they have approached the Court for remedy of the alleged violations.

2. Board of Education of the City of St. Louis

The original defendants in the case contend that, while a significant amount of racial separation exists in the St. Louis schools, the situation is not the result of Board action. Current racial patterns, according to the Board, have been created first by a state-mandated legally dual school system, and later by patterns of residential location. Board attorneys are arguing for a desegregation plan which involves St. Louis suburban districts and in which the State of Missouri provides assistance.

3. National Association for the Advancement of Colored People

In entering the case, it was the initial contention of the NAACP that the original plaintiffs did not adequately represent the class of pupils who had been the victims of discriminatory practice, and that the Consent Decree was deficient because it did not mandate desegregation forthwith. The NAACP is seeking a comprehensive and far-reaching system-wide desegregation plan.

4. U.S. Department of Justice

It is the argument of the United States Department of Justice that the constitutional rights of black school children in the St. Louis school system have been violated, and that a plan for remedy of that situation should be mandated by the court.

5. Concerned Parents for Neighborhood Schools

The Concerned Parents for Neighborhood Schools argue that the St. Louis Public Schools have not been guilty of discriminatory racial practices and, therefore, there is no need for a court-ordered desegregation remedy. The group strongly supports the concept of neighborhood schools and opposes, on constitutional grounds, any plan which assigns children to schools solely on the basis of race.

6. City of St. Louis

The City of St. Louis also takes the position that it was not the practices of the Board of Education that created racial separation in the schools, and that there is no legal basis for the imposition of a desegregation remedy. The City is concerned with a continuation of "white flight", arguing that destruction of the neighborhood school will lead to the destruction of the neighborhood and ultimately the City.

7. Involved Citizens Committee

The scope of the Involved Citizens Committee, and the role which that groups has played in the legal proceedings, has been much more limited than that of the other parties with legal standing in the case. The group is concerned with modification of only one portion of the desegregation plan submitted by the St. Louis School Board which relates to high school feeder patterns in the area in which the group is based.

8. State of Missouri

Based on the ultimate responsibility which the State holds for those units of government to which it has delegated its authorities, the Court named the Missouri State Department of Education, the State Commissioner of Education, and the State of Missouri as co-defendants in the case. It is the contention of the State that the matter is essentially a local one in which it has limited liability and should, therefore, have a limited role in remedy.

APPENDIX I

Interviews *

Evelyn Battle, President, St. Louis Teachers Union, Feb. 23.

Charles Burgess, Education Reporter, St. Louis Globe-Democrat, Feb.

James Ellis, Education Reporter, St. Louis Post-Dispatch; Feb. 27, March 21.

John Ervin, Vice-President, Danforth Foundation; Feb.

Richard Fields, Attorney, NAACP (with firm of Ratner, Sugarmon, Lucas, Salky and Henderson; Memphis, Tennessee); March 27.

Ted Gest, formerly Federal Court Reporter, St. Louis Post-Dispatch (now with U.S. News and World Report); March 22.

Mary Greensfelder, President, St. Louis League of Women Voters; Feb. 2.

J. Gerald Hebert, Chief Attorney, Civil Rights Division, U.S. Department of Justice, March 27.

Lowell Hey, Civil Rights Enforcement Agency, City of St. Louis; Feb. 16.

W. Jerry Johnson, Attorney, Civil Rights Division, U.S. Department of Justice; March 27.

Ernest Jones, Deputy Superintendent (Formerly Acting Superintendent), St. Louis Public Schools; Feb. 23.

David A. Lang, Associate Counsel, St. Louis Chapter of the NAACP; Feb. 24.

Joseph S. McDuffie, Attorney, Concerned Parents of North St. Louis; March 29.

James H. Meredith, District Court Judge, Eastern District of Missouri; March 30.

Richard Patton, Senior Research Analyst, Center for Metropolitan Studies, University of Missouri-St. Louis; and March 27.

Public Affairs Office, St. Louis School District; Feb. 16.

Paul B. Rava, Attorney, St. Louis Board of Education; March 30, 31.

William P. Russell, Attorney, Concerned Parents of North St. Louis; March 31.

Dorothy Springer, Member, St. Louis Board of Education and court observer; March 28.

Robert Wentz, Superintendent, St. Louis Public Schools; March 30.

*All interviews are from 1978.

APPENDIX J

Cited References

Doyle, Patricia Jansen, "St. Louis: City with the Blues," Saturday Review, February 15, 1969, pp. 90-93, 105.

Gittell, M. and Hollander, T., Six Urban School Districts: A Comparative Study of Institutional Response, New York: Praeger, 1967.

"Public Interest Law Notes-Civil Rights Enforcement and the Selection of Federal District Court Judges" St. Louis University Law Journal, Vol. 21, 1977, at 385.

Footnotes

1. This section draws generally on the following sources:

The Institute for Urban and Regional Studies, Washington University, "Urban Decay in St. Louis." Working Paper INS 10 (March 1972).

Gary Allan Tobin, "The St. Louis School Crisis: Population Shifts and Voting Patterns." Washington University Department of History, St. Louis (June 1970).

Barbara R. Williams, "St. Louis: A City and its Suburbs." Prepared for the National Science Foundation by RAND, Santa Monica (August 1973).

Patricia Jansen Doyle, "St. Louis: City with the Blues," Saturday Review (Feb. 15, 1969).

George R. La Noue, and Bruce L.R. Smith, The Politics of School Decentralization. Lexington Books, Lexington, Mass. (1973).

Michael Barone, Grant Ujifusa and Douglas Matthews, The Almanac of American Politics 1976. E.P. Dutton & Co., Inc., New York (1975).

2. La Noue, n.1 supra, at 37.
3. St. Louis Public Schools, Division of Public Affairs, "Facts for 1977-78."
4. See "Stipulation Between Plaintiffs and Defendants," filed June 7, 1974 (hereinafter "Stipulation of Facts.").
6. Liddell v Board of Education of the City of St. Louis
7. Letter from Minnie Liddell to Benjamin M. Price, Superintendent, Beaumont (Sumner District, August 21, 1971.
8. Concerned Parents of North St. Louis, "Position Paper" (forwarded to members of the Board of Education by Burchard Neel, Jr., Acting Deputy Superintendent, Oct. 14, 1971).
9. Id.
12. "Complaint," filed Feb. 18, 1972.
13. St. Louis Post-Dispatch, Jan. 24, 1976.
14. Id.
15. Joseph S. McDuffie, personal interview, March 29, 1978.
16. Id.
17. Court docket, Liddell v Board of Education, at Oct. 3, 1973.

18. District Judge James H. Meredith, personal interview, March 30, 1978.
19. McDuffie interview.
20. St. Louis Post-Dispatch, March 5, 1974.
21. Id.
22. Id.
23. Paul B. Rava, personal interview, March 30, 1978.
24. Stipulation of Facts.
25. The following two-and-a-half page description of how the consent decree was reached is based on the Rava interview.
26. Robert Wentz, personal interview, March 30, 1978.
27. Id.
28. St. Louis Globe-Democrat, Dec. 26, 1975.
29. Id.
30. St. Louis Globe-Democrat, Dec. 25, 1975.
31. St. Louis Globe-Democrat, Dec. 27-28, 1975.
32. St. Louis Post-Dispatch, Dec. 26, 1975.
33. St. Louis Argus, Jan. 1, 1976.
34. St. Louis Sentinel, Jan. 1, 1976.
35. Rava interview.
36. St. Louis Globe-Democrat, Dec. 31, 1975.
37. St. Louis Post-Dispatch, Dec. 31, 1975.
38. St. Louis Globe-Democrat, Dec. 31, 1975.
39. St. Louis Post-Dispatch, Jan. 16, 1975.
40. Id.
41. Id.
42. St. Louis Post-Dispatch, Jan. 22, 1976.
43. Id.
44. St. Louis Globe-Democrat, Jan. 24, 1976.
45. St. Louis Post-Dispatch, Jan. 22, 1976.
46. St. Louis Post-Dispatch, Jan. 24, 1976.
47. St. Louis Globe-Democrat, Jan. 23, 1976.
48. Cited in id.
49. St. Louis Post-Dispatch, Jan. 23, 1976.
50. Id.

51. Id.
52. St. Louis Globe-Democrat, Jan. 24, 1976.
53. St. Louis Post-Dispatch, Jan. 18 and Feb. 6, 1976.
54. St. Louis Post-Dispatch, May 4, 1976.
55. Wentz interview.
56. St. Louis Post-Dispatch, June 8, 1976.
57. St. Louis Globe-Democrat, Aug. 12, 1976.
59. See St. Louis Post-Dispatch, June 16, 1976.
60. St. Louis Post-Dispatch, Aug, 8, 1976.
61. Id.
62. St. Louis Post-Dispatch, Dec. 11, 1976.
63. Id. (Cite refers to all quotations in the paragraph).
64. Liddell v Caldwell, 546 F.2d 768 (8th Cir. 1976)
65. Id. at 771.
66. Id.
67. Id. at 772, n. 9.
68. Id. at 771-72.
69. Id. at 773.
70. Id. at 773, n. 10.
71. Id. at 774, n. 11.
72. St. Louis Post-Dispatch, Dec. 15, 1976.
73. St. Louis Post-Dispatch, Dec. 28, 1976.
74. St. Louis Post-Dispatch, Dec. 14, 1976.
75. St. Louis Post-Dispatch, Jan. 4, 1977.
76. St. Louis Globe-Democrat, Jan. 26, 1977; St. Louis Post-Dispatch, Jan. 30, 1977.
77. St. Louis Board of Education v Caldwell et al, 429 U.S. 1086 (1977). Also see St. Louis Globe-Democrat, Feb. 23, 1977.
78. St. Louis Globe-Democrat, Feb. 23, 1977. (Cite refers to all quotations in the paragraph).
79. McDuffie interview.
80. Id.
81. William P. Russell, personal interview, March 29, 1978.
82. McDuffie interview.

82a. Wentz interview.

82b. Rava interview.

83. *St. Louis Post-Dispatch*, March 1, 1977; *St. Louis Globe-Democrat*,

84. *Id*.

85. *St. Louis Globe-Democrat*, March 1, 1977.

86. *Id*., March 1, 1977.

87. *Id*., April 2-3, 1977.

88. *Id*., March 30, 1977.

89. *Id*., April 1, 1977.

90. *St. Louis Post-Dispatch*, April 19, 1977.

91. *St. Louis Globe-Democrat*, April 20, 1977.

92. *St. Louis Post-Dispatch*, April 22, 1977.

93. *Id*., April 24, 1977.

94. *Id*., (Cite refers to all quotations in the paragraph).

95. The following description of proposed desegragation plans draws from "A Summary of the Current St. Louis School Desegregation Case to December 20, 1977 (draft)", prepared by Richard H. Patton, Senior Research Analyst, Center for Metropolitan Studies, University of Missouri-St. Louis (1978) at 10-15. Also see *St. Louis Post-Dispatch*, May 29, 1977.

96. *St. Louis Post-Dispatch*, May 29, 1977.

97. Patton, n. 95 *supra*, at 20-21.

98. *Id*. at 21-22.

99. *Id*. at 22-23.

100. St. Louis Board of Education v. Caldwell et al., 433 U.S. 914 (1977).

101. Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977).

102. Milliken v. Bradley, 433 U.S. 267 (1977).

103. School District of Omaha v. U.s., 433 U.S. 667 (1977)

104. *St. Louis Post-Dispatch*, June 28, 1977.

105. *St. Louis Globe-Democrat*, July 15, 1977.

106. "*Liddell and Caldwell v Board of Education*, "Order," U.S. District Court, July 14, 1977.

107. *Liddell and Caldwell v Board of Education*, "Order,"

108. *St. Louis Globe-Democrat*, Oct. 18, 1977.

109. *Id*.

110. *St. Louis Globe-Democrat*, Oct. 15-16, 1977.

111. St. Louis Post-Dispatch, July 17, 1977.
112. St. Louis Globe-Democrat, Oct. 18, 1977.
113. Patton, n. 95 supra, at 25-26.
114. St. Louis Globe-Democrat, Oct. 18, 1977.
115. Id., Oct. 19, 1977; St. Louis Post-Dispatch, Oct. 19 and 20, 1977.
116. St. Louis Globe-Democrat, Dec. 6, 1977.
117. St. Louis Post-Dispatch, Dec. 7, 1977.
118. St. Louis Globe-Democrat, Dec. 15, 1977.
119. St. Louis Post-Dispatch, Dec. 18, 1977.
120. Id.
121. Id.; St. Louis Globe-Democrat, Dec. 19, 1977.
122. St. Louis Post-Dispatch, Dec. 21, 1977.
123. Id., Feb. 15, 1977. See also Id., Feb. 14, 1977.
124. Id., Feb. 8 and 9, 1977.
125. St. Louis Globe-Democrat, Oct. 22-23, 1977.
126. Id., Dec. 20, 1977.
127. Id., Oct. 22-23, 1977.
128. St. Louis Post-Dispatch, March 21, 1978.
129. Id., March 22, 1978.
130. St. Louis Globe-Democrat, March 21, 1978.
131. Id., March 23, 1978.
132. St. Louis Globe-Democrat, March 15, 1978.
133. St. Louis Post-Dispatch, March 24, 1978.
134. Id., March 28, 1978.
135. St. Louis Globe-Democrat, March 28, 1978.
136. St. Louis Post-Dispatch, March 28, 1978.
137. As recorded by the author while observing the trial, March 28, 1978.
138. St. Louis Post-Dispatch, March 16, 1978.
139. Id.
140. Id.

141.Quotations from Judge Meredith in the following section are based on the Meredith interview.

142.Dorothy Springer, school board member, personal interview, March 28, 1978.

143.St. Louis Globe-Democrat, Oct. 15-16, 1977.

144.Note, Civil Rights Enforcement and the Selection of Federal District Court Judges, 21 St.L.U.L.J., 385-427.

145.Stephen L. Wasby, A Little Social Science is a Dangerous Thing: A Response to "Civil Rights Enforcement and the Selection of Federal District Court Judges.", 22 St.L.U.L.J., 91-100.

145.Russell interview.

146.U.S. v Missouri, 515 F.2d 1365 (8th Cir. 1975)(in banc).

147.Wentz interview.

148.St. Louis Post-Dispatch, Jan. 24, 1978.

149.Springer interview.

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MINNEAPOLIS

Nancy Borow

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CASE SUMMARY

In August, 1971, a class action suit was filed against the Minneapolis School District by the local NAACP and a community-based organization called Committee for Integrated Education. The defendant School District was charged with segregative actions in the areas of size and location of schools, student assignment policies, and teacher and assignment policies. The trial lasted from April 10-25, 1972.

The District Court found the School District guilty of *de jure* segregation. As a remedy, the judge ordered the implementation of the School District's own plan with minor modifications. During the next several years, the School District took a piecemeal approach to desegregation, never quite complying with the court mandated standard for desegregating the schools. The court made some modifications to the plan, but the District still did not comply.

Beginning January, 1977, the District has urged the court to drop jurisdiction of the case. A motion to that effect was denied by the court. The District Court's decision was upheld by the Court of Appeal in September, 1978, and by the Supreme Court in June, 1979. To date, the School District has never fully complied with the District Court's orders.

I. The City of Minneapolis[1]

Minneapolis is a city of 432,000 people located on the Mississippi River in the southeastern part of Minnesota. With its somewhat smaller twin city, St. Paul, it is the center of a seven county metropolitan area of nearly two million. The city encompasses a large geographic area of 55 square miles. These boundaries have not been changed since 1927. Minneapolis has steadily lost population since its 1950 peak of 522,000, while the population of the metropolitan area has increased.

The city grew up around the flour milling industry and has evolved into a center of business and industry. It is the headquarters of several major firms such as Honeywell, 3M, and Control Data, General Mills, Pillsbury, and Cargill. It has a very active business community, which has a strong political base in the Downtown Council--an organization formed in 1955 to create a centralized structure of decision-making for business. The business community has been generous in its financial support of civic and cultural activities, the most noteworthy business undertaking being the redevelopment of downtown Minneapolis through the creation of the Nicollet Mall and the system of enclosed skyways connecting most of the centrally located buildings and businesses.

Most important to a study of school desegregation is an understanding of the major demographic characteristic that distinguishes Minneapolis from other large cities--its small minority population. In 1960, only three percent of the population was nonwhite. By 1970, this had risen to 6.4%. The breakdown among minority populations is as follows: 4.4% black, 1.3% American Indian, and .7% "other". There has been a steady migration by Indians to the city from the reservations, which has made Minneapolis the second largest urban center of Indians in the United States. The 1970 census reported about 6000 Indians in Minneapolis.

Although Minneapolis has a reputation as an enlightened community in regard to the treatment of racial minorities, housing in the city is severely segregated. Blacks are largely concentrated in two areas--one north and one south of downtown--while Indians are almost entirely concentrated in one south-of-downtown neighborhood. Although Minneapolis lacks slums of the kind in many other large cities, the housing condition of its minorities, particularly of Indians, is far from enviable.

Most white Minneapolitans are native Americans, with Scandinavian stock predominating. Owing to the large Scandinavian population, the Lutheran church is a powerful community force. Churches in general are very active in community affairs, and especially in the area of education. The population is of a more middle-class character than in other large cities. Reflecting the city's position as a major wholesale-retail center and a center for banking, finance and insurance, 30 percent of employed residents work in clerical and sales occupations. Almost as many (27 percent) are employed as craftsmen, foremen and operatives, and 20 percent are professionals, technicians, managers, and officials. Only 17 percent are employed in laboring and service occupations.

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Most homes in minneapolis are sturdy, single family dwellings built to withstand severe winters. Row homes are practically nonexistent, even in low-income areas. In 1970, 50 percent of the housing in Minneapolis was owner-occupied. With the exception of Northeast Minneapolis, which is heavily Polish and Slavic, Minneapolis is lacking in ethnic enclaves such as those that divide the populations in cities like Boston and Philadelphia. This has been seen as a major reason why Minneapolis avoided much of the turmoil that accompanied school desegregation in other cities. Minneapolis also has a large elderly population. In 1960, Minneapolis had the greatest percentage (13%) of persons over age 65 among the 30 largest cities in the country. By 1970, that percentage had risen to 15%. The elderly, like the minorities, are concentrated near the central city because of the availability of less expensive, multiple-unit housing and the convenience of public transportation.

Minneapolis and Minnesota have strong and continuing progressive traditions in politics. Hubert Humphrey, Walter Mondale, Eugene McCarthy, and Orville Freeman are all products of this tradition. In the late 1930s and 1940s, labor had a dominant role in the city government. During this period, a liberal-intellectual community was growing as a political force at the University of Minnesota in Minneapolis. A new coalition was formed in the 1940s between intellectuals and "good government" activists. One of the consequences of this coalition was the merging of the machine Democrats of Minneapolis, intellectuals, small businessmen, and farmer-labor interests into the now powerful Democratic Farmer-Labor (DFL) Party.

This "good government" movement gained strength in the 1950s and 1960s from the growing middle class of managers, executives, and professionals that came to the city along with the growth of the electronic-aerospace, computer-based industries. The high point of the "good government" movement in Minneapolis was the election of Arthur Naftalin, a professor of political science at the University of Minnesota, as mayor in 1961. It was during Naftalin's tenure as Mayor that the downtown revitalization effort, funded by the business community, began. The Downtown Council, formed in 1955 to combat the strength of the Central Labor Union, has been a powerful force ever since.

The Minneapolis municipal government is a "weak mayor, strong council" system. The City Council exercises both legislative and administrative powers, with the Council presidents having more actual power than the Mayor. The city is divided into 13 wards which serve as the bases for aldermanic elections to the City Council. In the early 1970s, the three wards in the southwestern part of the city tended to be upper-middle class to upper class; and the five wards in the northeast, northwest, and southeast sections of the city tended to be middle class. The lower class wards have a pattern of voting for DFL candidates, of opposing charter reform, and of low voter turnout. Upper class wards tend to vote Republican and to have a higher percentage of voter turnout and a greater support of charter reform proposals. Middle class wards tend to be swing wards and change their partisan preferences from election to election.

While Minneapolis is officially a nonpartisan city, party alignments have been a fact of life throughout the city's history. Few wards truly vote independently, and the political histories of long-term leaders in Minneapolis reveal strong traditions of partisan politics.

The State Legislature is dominated by rural and suburban interests. Minneapolis and St. Paul have tended to suffer from this orientation, particularly since the State Legislature tends to dominate county and municipal governments.

Suburban sprawl has been immense in the metropolitan area since the 1950s. In an attempt to respond to changing patterns, the Citizens League of Minneapolis became a strong advocate of a metropolitan council. In 1967 the State Legislature, after rejecting the idea in four previous sessions, created the Metropolitan Council. The Metropolitan Council took jurisdiction over the 3,000 square mile metropolitan area and its seven counties, 135 municipalities, 60 townships, and nearly 100 special districts for school, parks, libraries, and other services. The State Legislature stopped short of creating a full-fledged metropolitan government and limited the Council's scope to matters demanding regional decisions, such as sewers, highways, mass transit, waste disposal, parks, airports, and regional planning. The Council sets policies but has no operating authority.

Minneapolis has been fortunate to avoid the level of social problems experienced by many other large cities. Its crime rate and unemployment rate are typically below national averages. Yet it was not immune to the social disorders of the 1960s. In 1967, Minneapolis blacks set fire to a commercial strip along Plymouth Avenue in North Minneapolis, to protest the lack of jobs for blacks. The following year, reflecting mounting concern over social disorders, Minneapolis elected as mayor the "law-and-order" candidate Charles Stenvig, a former police detective.

Prior to this time blacks in Minneapolis were a quiet political force, working slowly through the NAACP and the Urban League to expand opportunities for blacks. After the rioting, Naftalin, along with 30 businesses, put together the local Urban Coalition. The Coalition joined the NAACP and Urban League as the focus of civil rights organization and leadership in the city. Because of their organization and their willingness to work with white leaders, blacks have been able to gain some political power in the city.

The Indian community, on the other hand, is lacking in organization and leadership. Cultural differences compound the problems that Indians face in establishing a power base in the community. While the majority of

Minneapolis blacks have lived in northern cities for most of their lives, Indians have recently arrived from reservations, and there continues to be much movement back and forth between the city and the reservation. Unlike the Minneapolis black, the Indian openly resists being integrated into the schools and the neighborhoods. His heritage is too near for him to ignore it. While Minneapolis blacks struggled for integrated schools and housing, Indians wanted all-Indian schools and communities where people would be responsive to their culture and their needs. The unemployment rate, the dropout rate, and overall living conditions are far worse for the Minneapolis Indian than for the Minneapolis Black.

II. The Minneapolis Public School System.

As of 1970 there were about 77,000 school children in Minneapolis. Of those, 68,000 (99 percent) attended one of the city's 97 public schools. The remainder attended parochial or private schools. Also as of 1970, the Minneapolis Public School System consisted of 98 schools: 68 elementary (K-6), 15 junior high schools (7-9), nine high schools (10-12), two junior-senior high schools, and four special schools. Over 3600 certificated personnel were employed.[1]

Control of the public school system ultimately rests with the seven member School Board. These non-salaried officials are elected by a district-wide popular vote for staggered six year terms. The length of these terms has been unsuccessfully challenged a number of times. The Superintendent serves as the Board's executive officer and professional advisor, and is selected by the Board.

In 1959, the Minneapolis public schools became Special School District No. 1. Prior to this, the Board of Education was selected by the City Council. The District now has the power to raise and levy taxes within state-determined mileage limits. It can also raise taxes by referendum. Since assuming its independent status, the School District has devoted much greater attention to lobbying efforts at the State Legislature. In 1967, the position of Special Assistant to the Superintendent for Urban Affairs was created to house the chief lobbyist for the Minneapolis Public Schools at the State Legislature.

Until 1973, city school districts tended to lose out in the urban-rural competition for school aid from the State. In the early 1970s, due to a concentrated political effort, cities of the first class were finally able to achieve a 59 percent increase in school aid from the State, making the distribution of state school aid funds more equal across the state.[2]

Both the District's operating budget and its per pupil costs have risen dramatically in recent years, as the following table shows.[3]

Table 1: Rising operating budget and per pupil costs

	Operating budget	Per pupil costs
1968	$48 million	$481
1969	54 million	587
1970	62 million	not available
--		
1975-75	78 million	1431
1977-78	90 million	1879

Close to 40 cents of each local property tax dollar went for school district levies in 1970, about the same as today. Minneapolis also receives federal funds through the Elementary and Secondary Education Act.

The Minneapolis Public School System has experienced rapidly declining enrollments over the last decade, as indicated in the following table.

Table 2: Minneapolis Public Schools, Enrollment, 1969-77

1969	1970	1971	1972	1973	1974	1975	1976	1977
68,278	66,934	65,021	61,889	58,833	56,161	54,613	52,402	49,306

The largest percentage declines came each year from 1971-74, and between 1976-1977.

1976-77.

Over this same period, the percentage of minority pupils has risen from 12 percent in 1969 to 24.4 percent in 1977. This change is due in part to declining white enrollments but also to an increase in numbers of minorities. The number of blacks in the schools has increased from 5528 in 1969 to 8090 in 1977. The number of Indian students has risen from 1843 in 1969 to 2658 in 1977. A breakdown of minority enrollments in 1969, 1971 (when the lawsuit was filed) and 1977 is as follows:[4]

Table 3: Minneapolis Public Schools, Minority Pupil Enrollment

	1969	1971	1977
Indians	1843 (2.7%)	2225 (3.4%)	2658 (5.4%)
Blacks	5528 (8.1%)	6351 (9.7%)	8090(16.4%)
Other Minority	795 (1.2%)	890 (1.3%)	1289 (2.6%)
Total Minority	8166(12.0%)	9466(14.5%)	12,037(24.4%)

A summary table of enrollments by racial category for 1969-1977 appears in Appendix A.

Similar figures for the total personnel of the School District are as follows:

Table 4: Minneapolis Public School District, Minority Personnel

	1969	1971	1977
Indians	32 (0.5%)	46 (0.7%)	117 (1.9%)
Blacks	355 (5.8%)	439 (6.5%)	481 (7.6%)
Other Minority	30 (0.5%)	49 (0.7%)	60 (0.9%)
Total Minority	417 (6.8%)	534 (7.9%)	658 (10.5%)

A summary table by racial category for 1969-1977 appears in Appendix A.

The Superintendent of the Minneapolis Schools between 1950 and 1967 was Rufus Putnam. He had been brought to the District at the urging of the Downtown Council, more because of his business capabilities than his concern about the educational process.[5] According to one Board member who was Board Chairman while Putnam was Superintendent, Putnam's only concern was money and "he really didn't know, or didn't care very much, about the educational process." This attitude caused a lot of resentment on the part of teachers to the point where teacher-administration relations became very strained. This eventually culminated in a teachers' strike in 1970, after Putnam had been eased out of his position.

The first black to serve on the School Board, L. Howard Bennett, was appointed in 1963 to fill a vacancy. Bennett had come to Minneapolis from Fisk University in the late 1940s under the auspices of Hubert Humphrey to carry out studies on the impact of racial isolation in the city. Bennett became an ally of Humphrey, Senator Walter Mondale and Congressman Donald Fraser. He was appointed to the Board on the suggestion of the very influential black Minneapolis newspaperman, Cecil Newman.

When Bennett left Minneapolis to take a position in the Johnson administration, another black, John Warder, was appointed to take his place. Warder had built a political base in the local NAACP and Urban League, and was a member of the NAACP political education committee. Warder left the Board in 1969, after winning election to the Board in 1965, to become President of the First Plymouth National Bank, a branch of the First Bank System of Minneapolis that was located in the heart of the North Minneapolis black community.

A third black, Harry Davis, was appointed in 1969 to complete Warder's term. Davis was another product of the NAACP's political education committee and went on to become Director of the Minneapolis Urban Coalition. Davis is still on the School Board, has served as Board chairman, and is now Vice-President for Urban Affairs of the Minneapolis Star and Tribune newspaper company.

Since 1967 marked the beginning of a new phase in the Minneapolis Public School System, with the arrival of a new superintendent, it is appropriate to introduce the seven members of the School Board in 1967, a Board that was described as cohesive, liberal, and strongly supportive of the new superintendent.[7]

Stuart Rider. A Board member since 1964, Rider was very influential during the pivotal years of the new Davis administration. A lawyer living in the liberal, upper-middle class Kenwood area of South Minneapolis, Rider represented a strong connection to the Minneapolis business community, the Citizens League, and the Citizens Committee on Public Education. Rider was considered an excellent mediator and leader among Board members, a central actor in moving the Board from constant politically partisan divisiveness to cohesive, educational action.

Viola Hymes. A Board member since 1963, Hymes was a former school teacher, extremely active in community affairs and viewed as a strong, liberal voice on the Board. She was long active in the National Council of Jewish Women and went on to become its national president.

John Warder. The lone black on the Board, Warder was appointed in 1964 and was elected the following year. Warder was a businessman who had come to Minneapolis from Kansas in the late 1950s. He was to be the spokesman for the city's blacks as racial issues began to emerge in the 1960s, although he was far from a loner representing unpopular positions. He was active in the NAACP and became interested in school politics through activities at his daughter's PTA. Warder resigned from the Board in 1969 to become a bank president.

David Preus. Preus was a minister in the American Lutheran Church, which has its headquarters in Minneapolis. He was elected to the Board in 1965, largely as a result of his community activism in the Southeast (University) community. Viewed by many as a leading intellect on the Board, Preus provided a vital link with the influential Lutheran and other religious communities of Minneapolis. He resigned in 1974 to become President of the American Lutheran Church.

Lawrence "Duke" Johnson. Johnson was the lone conservative on the Board during the period of mobilization for desegregation. He worked for Northern States Power Company (NSP) until he retired in 1972, and represented business interests on the Board. He was approached to run for the School Board in 1965 after a number of years of active involvement with the Citizens Commission on Public Education. His candidacy was supported by NSP, which gave him the time to campaign. Johnson served one term until 1971, when two more conservative, antibusing members were elected.

Frank Adams. Adams worked for the Veteran's Administration and was considered labor's representative on the Board. He had served on the Board from 1952-1963 before returning in 1967. He lived in the ethnic, Northeast, working class community and was a member of the influential Central Labor Council. Adams was to pay a heavy price for his open advocacy of desegregation, as he suffered censure by the Central Labor Council. The Council later formally removed the censure.

Florence Lehmann. A former newspaperwoman working in public relations and living in the predominantly white and middle class southwest section of the city, Lehmann described herself as an independent. She was, however, to receive strong support from city Republicans and the Citizens Committee on Public Education during her later candidacies. Lehmann was the Board's senior member, having served for 21 years at the time of her retirement in 1969.

These were the people who, in 1967, decided that the Minneapolis Public School System needed a new look. They were facing several problems simultaneously: a lackluster curriculum, financial troubles, deteriorating facilities, increasingly segregated enrollments, and seriously strained teacher-administration relations. They sent the word to the Harvard Graduate School of Education that they were seeking a new superintendent. What they sought most of all was strong administrative leadership. Both of the finalists for the position were products of the Administrative Career Program at Harvard. The one who was selected was John B. Davis.

Davis arrived from the superintendent position at Worcester, Massachusetts, where he had acquired a distinctive reputation for effective community relations. He brought with him an extensive knowledge of a national network of leaders in education and financing sources for education. He has been described as dynamic, extremely likeable, and well-informed. The School Board felt he was just what they needed to revitalize the School District.

III. The Beginning of Desegregation: 1967-71

The desegregation efforts of the Minneapolis School District began in 1967 with the arrival of the new superintendent, John B. Davis. The School Board, in looking to replace Rufus Putnam, who had been superintendent for 17 years, made an effort to find someone who was committed to desegregation. In so doing, the School Board reflected a growing nation-wide concern that students in the inner city schools were not receiving educational opportunities equal to those provided in other city schools.

As soon as Davis arrived, he assembled a new top administrative staff. Davis and his staff quickly developed a set of "Human Relations Guidelines", which the Board adopted in 1967. These guidelines were adopted "to facilitate racial balance and pupil placement, personnel practices, curriculum development, staff development, and compensatory education." They expressed a commitment to making "every reasonable effort" to integrate, but stayed within the framework of neighborhood school policy and voluntary integration. The central goal of the School District, as contained in the guidelines, was to achieve "quality education" in all the schools for all students. This emphasis on the quality of education was to become the key to the District's desegregation strategy.

The emphasis by Davis and his administration on human relations and community involvement set the tone of the surge of desegregation-related activity that occurred over the next few years. In 1967, a Special Assistant to the Superintendent for Urban Affairs was appointed to facilitate involvement of the community in a legislative program and in the development of the Human Relations Guidelines. In the same year, the first move toward decentralizing the administration of the schools was taken with the creation of the North Pyramid whereby North High School, and the elementary and junior high schools feeding into it, became a decentralized administrative unit. The objective of decentralization was to improve communication among schools and between the schools and the community. A second pyramid was formed in 1969, and in 1973 the present three-pyramid decentralized structure was created,with Area Superintendents and separate budgets for the West, North, and East areas.

Two separate programs affecting racial balance began in 1967. One was the Urban Transfer Program--a voluntary transfer program where majority and minority students were permitted to transfer upon request of their parents if such transfers 1) improved the racial composition in both the sending and receiving schools, and 2) would not result in overcrowding in the receiving school. The other was the voluntary busing of blacks from one school into two predominantly white schools. One of the white schools, Kenwood elementary school in south Minneapolis, was to become the center of pro-integration sentiment that eventually led to the lawsuit against the School District. At the time busing began, the Kenwood PTA had formed a human relations committee that had begun to put pressure on the School District to integrate the schools. This community contained a large proportion of higher income, liberal white parents who wanted their children to have an integrated education.

During the first years of the desegregation effort, the District focused on increasing the sensitivity of the staff and administration to minority concerns.[1] The Departments of Elementary and Secondary Curriculum began work in 1967 on a social studies program which emphasized human relations and the contributions of minority groups to American society. Also begun in this year were in-service professional growth courses for teachers, administrators, and social workers. Orientation programs for all new inner-city teachers began the following year, and a communications training seminar for counselors and administrators was conducted the year after. Beginning in 1969, Tuesday afternoons were devoted to human relations workshops for all inner city teachers, with students being released from school. Several conferences on human relations were held over the next few years for teachers and administrators. Also in 1969, the District began affirmative action recruiting of teachers in 1969, with visits to colleges and universities in 36 states.

This emphasis on staff training and development carried over to the time of the lawsuit and provided the basis for the School District's argument that they be given more time to accomplish desegregation. The District maintained that movement of students must await staff development and human relations training.

In addition to the issue of desegregation, two other emotionally charged problems faced the School District during this period--rapidly declining enrollments and aging and deteriorating central city school facilities. Two consultants were retained in 1968 to address these related issues. Their report, called the Domian-Sargent report, was released in 1969. It made recommendations for the use of facilities, including new construction plans, both in relation to integration and declining enrollments. The report provoked opposition on the part of those who felt more attention should have been given to the goal of integration.

The Domian-Sargent report had endorsed the concept of neighborhood schools. One group opposing the report was the Committee for Integrated Education, (CIE), the Kenwood-based group that was becoming increasingly active in its push for integration of the schools. CIE was among those represented on the Citizens School Facilities Committee, appointed by the School Board in 1969 to re-examine the findings of the Domian-Sargent report and make supplemental recommendations regarding the school system's building needs in relation to the goal of integration. The report of this 50 member committee appeared in 1971 and contained a recommendation for large elementary school complexes that was to become a key part of the School District's desegregation plan.

The School District got some encouragement from the State in 1969 with the passage of legislation designed to further the equality of educational opportunity for all school children in the state. Specific emphasis was to be placed upon improving educational opportunities for minority children and those classified as "educationally neglected." Minneapolis was appropriated $185,000 to provide a voluntary program for teachers and administrators which would include a human relations training course, workshops emphasizing methods for teaching educationally neglected children, attendance by teachers at community meetings, and home visits by teachers and administrators. Twelve Minneapolis schools were selected for participation in the program.

Two State actions of the same year served to bring some pressure to bear on the School Distrist. First, in July, 1969, Human Rights Commissioner Frank Kent advised both Minneapolis and St. Paul to accelerate the desegregation process and to present a preliminary plan by December 31, 1969. Second, the State Department of Education presented its own desegregation regulations to the State Board of Education, which turned them over to a task force for revision. The following year, the State Board of Education issued guidelines setting a 30 percent ceiling on minority student enrollments in the schools, and threatening to withhold State funds if the ceiling were surpassed. Although the School District would never take this State guideline completely seriously, it was later able to use the guideline to bolster its own efforts to sell its desegregation plan to a wary community.

The beginning of the School District's confrontation with the Minneapolis community over the issue of desegregation came with the revision of the Human Relations Guidelines in 1970. A new Department of Intergroup Education was formed in the fall of 1969, with an immediate mission of redeveloping those guidelines and an ongoing mission "to provide leadership and guidance in effectuating a sound human relations climate in the Minneapolis Public Schools." This department presented its preliminary report to the Board in 1969 and then took the proposed guideline revisions out to the community. Seventeen presentations were made, one in each junior high school district, describing and discussing the proposals, and soliciting reactions from the community.

On November 24, 1970, the School Board adopted the new "Human Relations Guidelines for Minneapolis Public Education in the 1970's" by a 5-1 vote. The key recommendation of the new proposal for desegregating the schools was the pairing of two or more schools to improve racial balance. The School Board approval was construed as support for pairing, and thus set off a flurry of community opposition. The Board described the vote as a "matter of conscience." Said Board member David Preus, "I wouldn't be able to live with myself if the city did nothing about racial and economic separation.

It's a modest proposal, the least we could do."[2] Up until this time, Minneapolis residents had hidden their racist sentiments, finding other grounds on which to oppose pairing, such as the preservation of neighborhood schools. But at this meeting the racism finally surfaced, as several vocal observers let the Board know of their objections to the Guidelines.[3]

The 1970 Guidelines replaced the 1967 goal of "quality education" with one of "quality integrated education." It began with a statement of educational principle:

> "The Minneapolis Board of Education is fully committed to providing quality education for all students....Quality education requires educational experiences which enable students to master the basic skills of reading, arithmetic, and language arts, and equally important, to develop skills in human relations...."
>
> "Every American has an equal right to a public education. Yet equal opportunity for education may be impaired or even destroyed by racial and economic segregation in public schools."
>
> "Lack of interracial contacts lead to fear, ignorance, prejudice, and racism. Students without interracial contacts will develop an inaccurate view of society and will be poorly prepared to participate effectively in a multi-racial community. To forego opportunities to educate students for a multi-racial society would be to fail them. Public Schools have the moral and educational obligation to deal deliberately and directly with the issue and problems of race, for the quality of our human relations is a key ingredient of good education."
>
> "In 1967, the Minneapolis Board of Education adopted the Human Relations Guidelines and instituted new programs with community and faculty support. Excellent education in Minneapolis in the coming decade will require new plans and an even greater effort. We cannot wait for housing patterns to change. Such a delay would deny quality integrated educational experiences to even more students than are currently deprived of such experiences."

The Guidelines included the following statement of an educational goal for the 1970's:

"An educational goal of the Minneapolis Public Schools for the next decade is quality education for all students. A quality school is 1) a school which is well-equipped and well-staffed, 2) a school in which racial composition of the student body approximates the racial composition of the total student population in the Minneapolis Public Schools, 3) a school where there is a climate of mutual trust and respect among the student body, faculty and school community, and 4) a school where a significant majority of the students perform at or above minimum reading and computation performance levels."

The Guidelines replaced the concept of "racially imbalanced" schools, contained in the earlier guidelines, with that of "educationally unrepresentative" schools. A school is educationally unrepresentative when 1) the percentage of minority enrollment exceeds two times the minority percentage district-wide, 2) the percentage of majority group enrollment exceeds the district-wide majority percentage, and 3) a significant proportion of the student population performs below acceptable reading and computation levels established by city and national norms. Since minority enrollment at this time was 12 percent, only schools with minority enrollments between 12 and 24 percent could be considered educationally representative. Seventeen of the 99 schools were unrepresentative according to this standard.

The document's "recommended programs and approaches for improving educational opportunity" combined the human relations and quality education priorities with some limited desegregation measures. The Urban Transfer Program was to be continued, with transportation costs furnished when needed. Building and boundary decisions would be made so as to foster integration. Magnet schools and magnet programs, such as had already been implemented at one high school would be considered as a means to "provide a greater number of educational options to students while improving the racial distribution."

The 1970-71 school year was designated a planning year for a variety of pilot pairing programs to be instituted in 1971-72. The concept of pairing, whereby schools combine attendance areas and divide grade levels among the different buildings, was endorsed as a desegregation strategy. Efforts to increase the number of minority teachers and administrators would be intensified, and minority personnel were to be assigned to schools throughout the system so that the faculty would better reflect the racial composition of the total school district's student population.

Addressing the question of implementing the guidelines, the document directed the School administration to begin developing a "comprehensive plan" based on the Guidelines with "clearly stated educational goals, order of priorities, and delineated program components."

A first step in that direction was taken in 1971, after the School District received notice from the State Commissioner of Education that, according to the new State guidelines, 17 Minneapolis Schools were segregated. The Commissioner requested that the School District file a plan within three months for eliminating segregation in the schools. In response to this request, the Assistant Superintendent for Intergroup Education produced a report closely based on the 1970 Guidelines. The report, entitled Desegregation-Integration: Equal Educational Opportunity/Quality Integrated Education: Minneapolis Public Schools, was edited and published by the Council of the Great City Schools, which also provided technical assistance in its preparation.

The Council of the Great City Schools was just one of the many organizations involved with desegregation issues with which the School District worked beginning in 1969-70. At the local level, the District worked with the Urban Coalition. At the State level, the District worked with a Blue Ribbon Task Force on Equal Educational Opportunity that was formed to revise the State Department of Education's desegregation regulations. And at the national level, the District was involved with the Institute for the Development of Educational Activities (IDEA).

The 1971 Desegregation-Integration report was the School District's plan for "quality integrated education," based on the premise that integration is "a necessary component toward the achievement of quality education and the creation of an educational environment where pupils, faculty, parents, and the community can work together in an atmosphere of mutual trust and respect." The report began by praising both the city of Minneapolis and the State of Minnesota for their "leadership in the area of human rights," and described the School District's plan as a "noteworthy achievement which is in the fine tradition of a city and state of which the Minneapolis Public School System is proud to be a part."

The report repeated the recommended approaches that had been stated in the 1970 guidelines, and proceeded to list many specific proposals, along with funding sources and dates for implementation. Again, the emphasis was on educational quality. A good example of this approach is the proposal to pair two elementary schools -- Field and Hale -- one of which is over 50 percent minority, and the other almost all white. One school would serve K-three with a team-teaching, continuous progress approach; the other would serve grades four-six according to a nongraded, individually prescribed program. Special programs in art, science, music, and physical education would be added at both schools. By emphasizing educational quality instead of racial percentages, the District hoped to assuage the growing community opposition to busing. The District sought to convince the public that where kids were being bused, there had to be something better at the end of the ride.

The period 1970-71 marked the height of antibusing, anti-pairing sentiment, as the District's desegregation plans became publicized. Since pairing required busing, antibusing and anti-pairing became the same thing. A poll taken in 1970 showed 54 percent of residents opposed to busing for integration, with 74 percent opposed to having their own kids bused out of the neighborhood. To many, it was acceptable to have blacks bused into their children's schools, as long as their own children were not bused out. Among blacks, 56 percent favored busing for integration, while 31 percent opposed it. The pairing proposals did not call for extensive, cross-town busing, since neighboring schools were the ones that were to be paired for the most part. Superintendent Davis made it known that he was opposed to massive busing, and the Committee for Integrated Education, the leading pro-integration force, was also opposed to large-scale, forced busing. But in spite of the limited nature of the busing that would be required, the community reacted strongly against it.

One antibusing organization, the Neighborhood Schools Committee, was formed in February, 1970, and opposed busing on purportedly financial grounds. The following year an umbrella organization, called Concerned Citizens of Minneapolis, formed in opposition to busing. Representatives of these groups, along with those from the vocal Taxpayers Party, began appearing at the School Board meetings to make their opposition known. Mayor Stenvig publicly opposed busing and pairing and proposed that the School Board be put under the City Council. Stenvig did more than anyone to bring the pairing issue into the 1971 School Board, mayor and City

Council elections. There was also an attempt to get an antibusing bill through the state legislature and proposed legislation to restructure the School Board. Under the bill, terms would be reduced from six to four years, and members would be paid. Most importantly, the bill called for a [illegible] of the whole Board in 1971, instead of just the two positions that were up for reelection. More than twenty citizen organizations formed a coalition called the Minneapolis Council for Equal Educational Opportunities, mainly to prevent the state legislature from restructuring the School Board. Neither state measure passed.

In the face of all the community opposition, the School Board delayed the plans to pair Field and Hale. This delay prompted Curtis Chivers, the chairman of the NAACP's Minnesota-Dakota education committee, to warn the District that they may be setting themselves up for a suit. Chivers issued this warning after conferring with the national NAACP. The grounds for the suit, he told the District, would be their bowing to community pressure tactics and community opposition to pairing.

But the District was hit from the other side first. In March, 1971, the School Board finally voted 6-1 to pair Field and Hale. This was the first major step taken by the District in nonvoluntary integration. A newly formed organization, called Citizens for a Quality Education, asked the School Board to rescind its pairing action. Then on July 16, 1971, this organization filed civil suit in Hennepin County District Court, charging that pairing violated the state constitution or its education code. The suit claimed that pairing violated the requirements of uniformity in the school system and sought to establish a new classification of schools not provided by legislation. While this suit was dismissed on August 31, 1971, it served to put the School District in the strange position, for a short while in 1971, of being sued from one side for its pairing actions, and from the other side for its failure to act to desegregate the schools. This awkward situation hurt the District in the desegregation suit, since it limited its ability to argue that there was no segregation requiring affirmative action on the part of the District.

In the School Board primary election in 1971, two pro and two anti-pairing candidates won. The total anti-pairing vote was twice the pro-pairing vote, but was badly split. In the November election, the two anti-pairing candidates won.

In August, 1971, the month after the anti-pairing suit was filed, Charles Quaintance, representing the Committee for Integrated Education and the Minneapolis Chapter of the NAACP, filed suit against the District in Federal District Court, charging that the District was maintaining segregated schools in violation of the United States Constitution. The two new School Board members had their work cut out for them, trying to keep the Court out of school matters and to convince the other members of the Board to reverse their stance on desegregation.

IV. The Trial.

The School District's 1971 Guidelines and the Desegregation/Integration report based on the guidelines stopped short of constituting an actual desegregation plan. The State Department of Education rejected the Minneapolis "plan," saying that it was insufficient since it lacked a timetable. Whether or not the Board had been prepared to follow through with a desegregation effort when it first adopted the guidelines, it clearly yielded to community opposition to the pairing endorsed by those guidelines. In preparing the guidelines, the School District had adopted a posture of responsiveness to the community. It would thus have been difficult for the district simply to proceed with the pairing plans in spite of the strong public opposition to pairing. It became apparent to many observers at this point that nothing was going to be accomplished without legal action.

The group that became the most frustrated by the Board's inaction was the Committee for Integrated Education (CIE). CIE was formed in 1968 as an outgrowth of PTA activity in the liberal and affluent Kenwood area of south Minneapolis. Discouraged with waging their battle through the neighborhood PTA, pro-integrationists formed the CIE, after a controversy over whether it should be called the Committee for Quality Education or Integrated Education.[1] At the time of its formation, CIE was seen as a city-wide organization that would have representation by high school district. Its strategy was to filter into other organizations, such as the Citizens Committee on School Facilities, that was studying the findings of the Domian-Sargent report. Its membership, however, was largely confined to people from the Kenwood area, and was mostly white, although there were a few very influential blacks involved.

CIE and other pro-integration groups, like the umbrella Minneapolis Citizens for Equal Educational Opportunity, became heavily involved in community organizing in the period from 1968-70, only to find the rewards disproportionately small in comparison to the energy and effort involved. As the CIE Chairman put it: "Finally it dawned on us that if we were really serious we may have to go all the way and bring suit....The heck with organizing and trying to get everyone to maintain their interest; with a lawsuit you need only a few really committed people."[2]

In 1970 the Minnesota-Dakota branch of the NAACP held a convention in Minneapolis. The education director, Curtis Chivers, met with CIE and outlined what they would have to do to prepare to file suit. CIE decided unanimously to file suit, a decision described as "scary" by its chairman. CIE had read about a lawyer named Charles Quaintance, Jr. in the newspaper. Quaintance was a newcomer to Minneapolis from a five-year position with the Civil Rights Division of the U.S. Department of Justice, where he had successfully litigated several school desegregation cases, including Pasadena, Tulsa, and three Alabama county cases. Quaintance accepted a position with a Minneapolis firm, anticipating that Minneapolis might soon be facing a desegregation suit, and that, because of his reputation, he might be asked to represent the plaintiffs. CIE did ask Quaintance to represent them in the suit and he accepted.

Money for the lawsuit came partly from the local NAACP and partly from a tax-exempt organization--Action Fund for Integrated Education--that was created to raise money for the suit. Quaintance did not ask to be paid. He did not want any NAACP lawyer to assist him in the case, so he alone represented the plaintiffs. Some members of the local NAACP

Board did not support the suit. Although there was little manpower support from NAACP, there were some committed people speaking out in favor of action.[3]

The suit was instituted by CIE and the local NAACP in August 1971 as a class action on behalf of all Minneapolis public school children. Three individual plaintiffs were chosen. One, a black fifth grader, was the granddaughter of Curtis Chivers, the education director of the Minnesota-Dakota NAACP. Another was a black ninth grader, whose father was a lawyer. The third was a white 11th grader whose father was a professor of journalism at the University of Minnesota.

The scope of the segregation at the time of trial was as follows: 13 elementary schools, two junior high schools, and two high schools had minority enrollments greater than 30 percent. At the senior high level, this could have been corrected by minor boundary changes. Over 55 percent of the black elementary school children attended schools with a black enrollment of over 30 percent, while 74 percent of white elementary school children attended the 27 elementary schools with black enrollments of less than five percent. At the junior high level, over 68 percent of minority students attended schools with over 30 percent minority enrollment, while 63 percent of white students attended schools with less than five percent minority enrollment. Thirty-four of 100 schools had all-white faculties.[5]

The antibusing suit filed one month earlier in Hennepin District Court was one reason the desegregation suit was filed when it was. Suing the school district to desegregate the schools at a time when the district was defending its voluntary action to desegregate students worked to the favor of the plaintiffs, as the district would not convincingly be able to argue that it recognized no need for affirmative action.

The suit took nobody by surprise and was actually welcomed by some members of the administration and the School Board. The Minneapolis newspaper reported that individual School Board members had said privately that they would not be upset if there were to be a court order to speed up the integration effort, although the paper noted that no school official was known to have encouraged the suit. The six board members who had been consistently voting in favor of desegregation looked to the suit as a means to take the burden and blame away from them. They would be able to accomplish desegregation while avoiding the charge that they had ignored community opposition. In the words of the Minneapolis newspaper: "The suit appears to be an attempt to provide support for the school board to do what it knows is right, but what is politically impossible--full integration of the schools."[6]

Although Board members may have welcomed the lawsuit, neither they nor the Administration welcomed the thought of losing their planning authority over the school district to the Court. So they set about formalizing their own plan, to be sure to have it ready by the time the trial ended. Also spurring some planning action by the School District was the fact that the State Board of Education had again rejected the Minneapolis desegregation "plan", finding the one-step-at-a-time approach unsatisfactory, and had requested a new plan by October, 1971. In response, the Administration devised three alternative plans to take to the community for another round of community meetings. The meetings were not so much to obtain usable feedback as they were to continue to give the impression that the District was concerned about community feeling, and was not simply forcing something on the people.

The three plans were: 1) bus in nearly all schools to achieve a 7-27 percent minority enrollment in all schools; 2) bus only to desegregate those schools that had more than 30 percent minority students, leaving 29 nearly all-white schools; and 3) pair schools, exchange some students with suburban schools, reorganize attendance levels, so that all schools are less than 30 percent minority but leaving some with very low minority percentages. The first plan was clearly a "straw man", probably offered to emphasize, through its rejection, that the District was not going to engage in full-scale busing. The third plan was rejected when the District failed to obtain the cooperation of the suburban school districts. A combination of the second and third plans was ultimately proposed by the School Administration and adopted by the Board.

By the time the trial began, the district had completed this final plan, although the plan had not yet been approved by the Board. The decision to go ahead and develop a full-fledged plan before the case came to trial was made by Superintendent Davis, against the advice of the deputy superintendent. Said the latter: "I told John that we ought to wait, because we were certain the schools were going to be ordered to desegregate by the federal courts, and that way the court would take the heat, not us. But he thought about it a long time, and said, no, we would announce our plans before the courts got into it."[7]

Davis reported that he made that decision partly because desegregation was "right" and partly because of "the feeling that a decision might be made that was not right for Minneapolis how to run its schools."[8]

During this planning phase, the anti-pairing, antibusing sentiment reached a peak, and two anti-pairing candiates, Olson and Borea, were elected to the Board, cutting the pro-integration advantage on the Board to 5-2. The two new candidates immediately set about to halt the pairing of Field and Hale, but failed. In the fall of 1971, the pairing began. Two hundred thirty-four students left the paired schools, while 68 transferred in from other districts. Pairing occurred without incident.

The three proposed plans were criticized by pro-integration forces for emphasizing body-mixing, and thus being inconsistent with the Board's policies on integration and human relations. The State Board of Education again rejected all three plans for their failure to meet state guidelines and requested a new plan by January, 1972. At this time the State Board of Education's guidelines had no legal force behind them. But, probably in reaction to Minneapolis' failure to act, the State Board decided to make its guidelines mandatory, meaning that failure by the District to comply could cause the State to withhold funds. Since new legislation had just authorized the State to pay 80 percent of local busing costs, failure to comply could have hurt the District severely. However, the District had never quite taken the State Board of Education's threats as serious, and was more concerned with what the Court would have to say in the matter.[9]

Judge Earl R. Larson was to try the case. Larson, in 1971, had served on the District Court bench for ten years.[10] The son of a janitor, Larson grew up in north Minneapolis and attended North High School. He worked his way through the University of Minnesota and its Law School. After law school Larson went into private practice, and then to the U.S. Attorney's office in St. Paul. After the war, he founded a Minneapolis law firm along with an old friend. The firm has produced many of the leaders of the state's DFL party, including Vice President Walter Mondale, Representative Donald Fraser, former Governor Orville Freeman, Minneapolis Supreme Court Justice Harry MacLaughlin, and former federal communications commissioner Lee Loevinger.

Before becoming judge, Larson helped campaign for Hubert Humphrey and former Minneapolis Mayor Arthur Naftalin. He also served as chairman of the governor's Interracial Commission, forerunner of the Human Relations Commission, and helped found the Minneapolis Civil Liberties Union. Larson was appointed to the federal bench in 1961 by President Kennedy. He turned down several judgeship appointments over the years until the federal vacancy occurred.

He is considered by attorneys and his colleagues on the bench to be a quiet, aloof, hard-working judge. According to one of his colleagues on the bench, "he is a judge's judge. He works from 7:00 in the morning until 7:00 at night and doesn't delegate a lot of work." He is not at all flamboyant or colorful in or out of the courtroom. Although his opinions have received considerable attention in the news media, Larson rarely talks with reporters. His law clerks, who are also reluctant to talk to reporters, explain that the judge does not want any outside factors to influence his objectivity, according to a former clerk. "He didn't like to see other lawyers in public and he didn't like the backslapping." Consequently, Larson usually eats lunch in a cafeteria with his clerks to avoid other attorneys.

Larson is considered a liberal and an activist on most social questions. However, he is viewed by many defense attorneys as a harsh sentencer in criminal cases, particularly those involving drugs.[11] Many of his opinions have had far-reaching implications for Minnesota's social and political fabric. Larson cited two cases, in addition to the Minneapolis desegregation case, as his most socially significant. The first came in 1971 when he ordered the Minneapolis Civil Service Commission to hire minorities on a preferential basis for the city's all-white fire department (Carter v. Gallagher). Although the ruling was modified on appeal, the minority preference was retained. In 1974 Larson cited some cases of "cruel and inhuman punishment" at a State hospital, and said the hospital lacked sufficient staff for "purposes of basic custodial care or for effective rehabilitation of its residents." He set timetables for augmenting the staff and ordered air conditioning and carpeting for the health and safety of patients. A former clerk cited this case as an example of Larson's liberal and activist rulings in the absence of a binding 8th Circuit precedent.[12] The clerk described Larson as a legal conservative, however, in that he is unwilling to buck a precedent that is clearly established.

Larson retired in June, 1977, at the age of 65 and assumed a position as a senior judge to finish cases still before him (including the desegregation case) and to take on special assignments. He is reported to be in poor health.

Both the plaintiffs and defendants indicated that they were pleased that Judge Larson would hear the desegregation case. The plaintiffs were pleased because of his reputation as a social liberal. The defendants were pleased because of his reputation for fairness. They hoped to come away from the trial in command of the schools with their own plan. Thus they were glad to have a judge with whom it was known that one could reason. In fact, "fair" and "reasonable" were the words that nearly everyone chose to describe the judge, along with high praise of his abilities. In addition, the defendants were probably confident that because of the judge's passive personality, he would not be inclined to assume the administration of the schools.

The attorney for the defendants, Norman Newhall, had been the School District's lawyer since 1965. He had never had any experience in school desegregation litigation. Newhall said that there was no question in his mind but that the judge would find segregation to be de jure in Minneapolis. In his words, the District put up only a "token resistance" to the charge of de jure, being politically unable simply to admit to the charge.[13] The main issue to Newhall and to everyone involved was that of the time allowed for implementing a desegregation plan. Consequently, much of Newhall's efforts went into arguing that desegregation could not be instituted immediately.

The trial lasted from April 10-25. About 30 percent of the trial time was devoted to establishing de jure segregation, and 70 percent to the question of remedy.* Few witnesses from outside the District were called. While plaintiffs employed an expert witness to criticize the defendant's plan and suggest modifications, defendants had none. Most witnesses were called by the plaintiffs and then cross-examined by Newhall. The one outside witness called by defendants was Donald Johnson, Director of desegregation for the San Francisco schools, who testified that in his district, desegregation worked best where time had been allowed first for teacher preparation.

The trial was mostly conducted in a low-key manner without much emotional interchange. There was, however, some heated testimony regarding discriminatory treatment of faculty by the District. Throughout the trial Larson was a passive participant, rarely taking charge of the proceedings, but listening and asking an occasional question.

At the trial plaintiffs charged the defendants with segregative actions in the areas of 1) size and location of schools, 2) student assignment policies, and 3) teacher and staff assignment policies. Some specific examples are given below.

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*In the absence of a trial transcript, the estimate of defendants' attorney was used.

Size and location of schools. In the complaint plaintiffs charged defendants with "locating some of its new schools and additions in such a manner as to increase the degree of racial segregation." For example, an elementary school was built in 1968 with a much larger capacity than other schools. It was built in an area with a large minority population and had the effect of placing most of the minority children in that area of the city in one school.

In another Board action, seven new classrooms were added to one elementary school which was 40% black and which already had more students than any of the four surrounding predominantly white elementary schools. In a similar situation an addition was built to a high school that was 97% white at a time when the school was overenrolled by 600 students. At the same time a neighboring high school with only 23% black enrollment was underenrolled by 600 students.

The Board also put portable classrooms in schools with high black populations, even though there was room for the students at neighboring schools with very low minority populations. In several cases where there were small white neighborhoods adjacent to large minority neighborhoods, abnormally small white elementary schools were constructed while at the same time large black schools were maintained.

Student assignment. Plaintiffs charged defendants with segregative intent in the assignment 1) of more than half of white elementary school pupils to schools with enrollments less than one percent black and 2) of half of the black elementary school pupils to majority-black schools when only 10% of the elementary school children in the District were black.[14] Plaintiffs cited specific instances of Board actions with respect to boundary changes and transfer policies that promoted segregation and that showed a "failure to take reasonably available steps to overcome the effects upon student assignment of residential segregation."[15] For example, in 1968 a boundary change was instituted between two predominantly white high schools in order to transfer students from one heavily overcrowded school to one which was only slightly over capacity. This decision was made in spite of the fact that another adjacent high school (the one with the highest percentage of minorities in the District) was far below capacity.

Plaintiffs pointed also to the Board's policy of allowing transfers if principals of both schools involved agreed. The largest number of transfers were from schools with large minority populations, which plaintiffs charged indicated that transfers were used as a way of perpetuating segregation. Also contributing to segregated schools, according to plaintiffs, was the Board's tendency to create optional attendance zones along the perimeter of minority neighborhoods.

Teacher and staff assignment. Plaintiffs charged defendants with assigning teachers and staff on the basis of race. More than half of the black professional personnel was assigned to schools with enrollments over 25% black, while there were no black teachers or administrators in 46 schools, most of which had enrollments less than 1% black.[16] Board policy concerning teacher transfer was based on seniority, thus confining most minority teachers to minority schools. Although the Board has a legal right to transfer any teacher to any school if it finds that to be necessary, plaintiffs charged that this power was never used to achieve faculty integration. Also preventing faculty integration, according to plaintiffs, was the fact that principals had an absolute veto over any teacher transfers into their schools and were not even required to give a reason for rejecting a new teacher.

Other issues raised by plaintiffs. Assuming the trial saw plaintiffs raising the charges mentioned in the complaint, the following additional charges against defendants were raised in the trial:

1) The district permitted public opposition to integration to influence its decisions regarding student assignments. This charge referred primarily to the first instance of school pairing, which was delayed once community opposition became apparent.

2) The district decided to integrate the schools over a period of several years, instead of achieving racial equality immediately. Plaintiffs used their expert witness to show that the District's plan could be implemented more quickly.

3) The District failed to submit to either the Minneapolis Department of Education or the Minneapolis Department of Human Relations an integregation plan consistent with the requirements of State or Federal law.[17] This charge was in reference to the District's failure to meet the several deadlines established by the State for the submissions of desegregation plans.

The defendants denied the specific allegations and pointed to the "significant and meaningful steps to reduce such de facto segregation as exists" that it had taken "for the last five years." These were:

1) the passage of comprehensive human relations guidelines in 1967 and 1970;

2) the use of a variety of programs to redistribute school enrollment,

including voluntary transfer programs, pairing, use of a magnet school, boundary adjustments, and a strong compensatory education program;

3) active recruitment of minority teachers and administrators;

4) assignment of teachers to schools on the basis of educational needs of the pupils rather than on the basis of race;

5) the construction of new facilities of a size and in a location such as to further racial integration;

6) a policy of granting school transfer to pupils only when racial balance is improved by the transfer.

The answer concluded with the statement that the District has moved "as rapidly as possible without jeopardizing the quality of the educational program," that it recognized the problem of de facto segregation, and was committed to positive action, "consistent with the budgetary limitations and with the practicalities of the situation." As a final plea to retain control of the schools, the answer stated:

> The details, scheduling, and priorities of the many steps being taken and under consideration related to this problem are the responsibility of the Minneapolis School Board, and it has indicated its intention in good faith to attack the problem. In this situation there is no constitutional requirement and no necessity for intervention by the federal court.

In the portion of the trial concerning the establishment of de jure segregation, Judge Larson found school policies concerning size and location of schools, student assignment, and teacher and staff assignment to be indicative of the District's intent to segregate.

Size and location of schools. With respect to the 1968 construction of a large elementary school in the middle of a minority neighborhood, Larson wrote in the opinion (351 F.Supp. 799):

> The size and location of Bethune School...were intended to have the effect of continuing the pattern of racially segregated schools which had existed in Minneapolis since at least 1954. From its inception it was clear that the location of the school would cause it to have an extremely high Black enrollment....By constructing Bethune with a capacity of 900 instead of the 500-600 optimum which is generally used by the District, the defendants intentionally increased segregation....(at 803.)

In reference to the addition to the already overpopulated white high school Larson wrote that "the defendant advanced no reasons nor justifications for this course of conduct. Therefore, when viewed along with other actions of the defendant, this Court views the addition at Washburn to have been racially motivated." (803) Larson also held the construction of abnormally small white schools to be intentionally segregative. "In light of the defendant's policy of building schools with capacities of 500-600, a school of such significant deviation on the perimeter of a minority area can only be seen as an attempt to further segregation." (804)

Student assignment. Larson's approach to the question of "intent" in establishing that segregation was *de jure*, was to assume that an action was intentional if no alternative explanations were offered. He took this approach with respect to the boundary change made between two overcrowded white schools that ignored a neighboring underenrolled school with a large minority population. "The Court views the boundary change to have been racially motivated, especially in light of the fact that no alternative reason for the change was presented at trial." (804) Larson also took the liberty of asserting "intent" as part of his findings, as in the following ruling on the policy of creating optional attendance zones along the perimeter of minority neighborhoods: "Often the intended effect of optional zones has been to allow White students to 'escape' from schools with heavy minority enrollments to schools which are identifiably white." (804)

Teacher and staff assignment. Larson again presumed a segregative intent to be behind the Board policy of permitting school principals to veto the transfer of teachers into their schools without giving any reasons. "It is obvious that a principal seeking to maintain an all White faculty at a majority school has little trouble in doing so. This policy has been partially responsible for the failure of the defendant to have an integrated faculty." (805)

Although Larson's general approach to defining the wrong was to find intentional segregation where there were no alternate explanations for an action, he did acknowledge some difficulty in determining de jure segregation in the face of residential segregation and a neighborhood school policy:

> ....uncertainty has developed over what in fact constitutes "segregation imposed by law." The uncertainty is due in large part to the fact that the Supreme Court has specifically with held decision on the question of whether school segregation caused by the implementation of a neighborhood school system on a district with racially segregated housing patterns is "segregation imposed by law." Until this question is answered, no Court can be certain what the ultimate limits of the constitutional prohibition against segregation in education may be. However, it is beyond dispute that:
> (a) if the State and/or the school administration has taken any action with a purpose to segregate, and
> (b) if that action has had the effect of creating and aggravating segregation in the schools of the District, and
> (c) if segregation currently exists, and
> (d) if there is a causal connection between the acts of the school administration and the current condition of segregation, then there is segregation which is imposed by law; and such is prohibited by the Fourteenth Amendment to the Constitution.
> Keyes v. School District No. 1 (807-8)

The information on which the plaintiffs based their charge of de jure segregation was largely collected from the School Administration headquarters building by CIE members.[18] The District gave them unobstructed access to all of its files.

The remedy-framing portion of the trial focused on the proposed plan that had been developed by Davis and his staff. The plaintiff's expert witness, Michael J. Stolee, was a central actor in this part of the trial. Stolee grew up in Minneapolis and attended the public schools there. He was, at the time of the trial, a Professor of Education and Associate Dean of the School of Education at the University of Miami in Coral Gables, Florida. Prior to that he was Director of the Florida School Desegregation Consulting Center.

At the direction of the plaintiff's attorney, Quaintance, Stolee limited his testimony to comments and criticisms of the District's plan, rather than offering independent suggestions regarding a remedy. Plaintiffs thus used the plan as something the District said it could accomplish, and tried to improve upon it. Stolee testified that the District plan was adequate except for three things: 1) it did not call for integration of faculty, which he said was an essential ingredient of a workable plan; 2) it provided no ceiling for minority enrollments; and 3) it proposed to desegregate the schools over a period of three years. Stolee and the plaintiffs argued that desegregation could and should be achieved within one year.

The School District's plan consisted of three parts--human relations training, school construction, and student desegregation. The District maintained that student desegregation had to await the implementation of the construction and training elements of the plan so that the system would be fully prepared for desegregation. Stolee proposed to reduce the time frame for desegregation from three years to one in two ways. At the elementary level Stolee proposed that the District use the existing buildings until the new ones were ready. He presented an exhibit which explained how this could be accomplished. At the secondary level Stolee proposed that desegregation be implemented everywhere at once but that high school juniors be allowed to stay in their present school, regardless of boundary and student assignment changes. This proposal was directed at the defendant's concern for minimizing the number of students that would actually have to switch schools, a concern which had prompted defendants to propose to phase in desegregation over a period of three years. Stolee also argued that while faculty training should continue, there was no reason to delay desegregation on account of the training.

Larson adopted Stolee's recommendations on the first two points. He ordered the faculty integration plan proposed by Stolee, and established a ceiling on minority enrollments of 35 percent, taking the District's own definition of twice the district-wide minority percentage (15 percent) and adding a cushion on top of that. The third issue--length of time allowed to desegregate--was actually the principal area of dispute and the most difficult one for the judge. As a reflection of his fairness and his concern for promoting cooperation among the parties, he accepted the District's three-year time frame.

Because of the ruling on the time issue, the District felt that it won a significant victory in the trial. It was clear to both parties before the trial began that this was not going to be a "winner-take-all" kind of case. The point that the District most hoped to win was that of time to allow it to implement its own plan as proposed. The District argued that it needed three years in order to complete its construction program and the human relations training it believed necessary to prepare staff for racial integration and for the new educational alternatives that would accompany desegregation.

The substance of the remedy was thus to give legal sanction to the District's own plan, with some minor modifications. In the written opinion, Judge Larson demonstrates his belief that the Court should not assume an "educationist" role:

> In accepting the District's plan, the Court is in effect rejecting most of the changes suggested by the plaintiff's expert. This is no reflection upon him. He appeared to be objective, fair, and reasonable. However, this Court agrees with Judge Eisele that if the District's plan meets constitutional requirements a court need look no further. "It is for the school board, not the Court to establish educational policy.". . .This is especially true when the defendant appears to be exercising good faith. The preparation of a plan of this quality in the face of this lawsuit indicates that this defendant is not a recalcitrant district whose promises are suspect. (810)

In ordering that the defendants proceed to implement their own plan, Larson noted that

> the Court is greatly impressed by the obvious amount of consideration and preparation which went into this Plan. Its attention to staff development and human relations training is laudable and should, if anything, be stressed more strenuously. (810)

The "good faith" aspect of the School District's own efforts was a central factor in the Judge's handling of the case. He began with a situation which was less controversial and adversarial than is typical of school desegregation cases, and he was intent on keeping it that way. Larson wanted to keep everyone cooperating, because he felt that cooperation was the key to successful court-ordered desegregation. By the close of the trial he had evidently decided that cooperation came first, even at the expense of slowing down the desegregation process. This is a position that he has taken to this day, throughout the many implementation problems that the District has experienced.

The actual impact of the trial was thus not one of determining the kinds of desegregation actions that would be undertaken, since most of what was ordered was contained in the District's own plan. Rather, the trial had two main effects. First, it forced the District to speed up its desegregation planning and put its plans into a time frame, something which the State had been trying unsuccessfully to get Minneapolis to do for a couple of years. Most observers feel that implementation of a desegregation plan could never have begun without the court case. The board had come to a near halt as a result of community opposition, and the school board election of 1973 could have ended all effort to desegregate with a victory by anti-integration candidates. This leads to the second major impact of the trial: it served to all but remove school board politics from the desegregation issue. Once it became clear that the court would remain in control for some time, there was no longer any chance that action could be halted by electing a majority of anti-integration members to the board. Reflecting this reality, busing and pairing were not the overriding issues in the 1973 campaign that they had been in 1971. Two moderates were elected and the court continued to try to balance the effort to promote cooperation with the need to desegregate the schools.

V. The Plan

The District's plan that was the subject of testimony during the trial had been proposed by the Administration but not yet approved by the board. The board revealed that the trial had forced it to act and that it indeed feared a court-imposed plan by approving that plan by a 5-2 vote the same day the trial ended: April 25, 1972. It approved the plan knowing that there was considerable public opposition to it and that the action could result in a conservative takeover of the board. The two opposition votes came from the two anti-pairing candidates that had been elected in 1971. The plan, with some court-ordered modifications, which will be discussed later in this section, was the remedy ordered by Judge Larson.

Superintendent Davis, in the letter of transmittal to the board which accompanied the plan, acknowledged that the administration had benefitted from the suggestions of the Association of Afro-American Educators, the League of Women Voters, the Urban League, the Citizens Committee on Public Education, the Human Relations Committees of both the City of Minneapolis Education Association and the Minneapolis Federation of Teachers, the Minneapolis Coalition for Equal Educational Opportunity, the Urban Coalition and the NAACP. The letter states that the plan is designed "to secure what so many of our citizens requested, namely, the opportunity to develop our own city plan for desegregation-integration without the imposition of state or court orders."

The plan, entitled Desegregation/Integration, was divided into three parts: elementary level, secondary level, and general program support.[1]

The elementary level plan had the joint goals of eliminating the "maximum number of racially isolated schools" and replacing "the maximum number of old, obsolete buildings." The plan adopted the premise that it was unwise to disperse minority students across the city in small numbers. This plan involved two main desegregation techniques. The first was the construction of large elementary school complexes, called expanded community schools. This idea had been developed by CIE, and was proposed by the Citizens School Facilities Committee in its 1971 report. Three such complexes were to be built, two on the north side and one on the south side. Each complex would have two or three units, each capable of housing 500-700 students. Different units within each complex would be used either to house different grade levels, or to provide different kinds of instruction. The District was in this way introducing the idea of educational alternatives, the varying of educational approaches that was later to become a key part of the desegregation approach. Complexes would improve the racial balance by drawing from a much wider attendance area, and would provide flexibility for the future by more easily accommodating shifts in residential patterns. They were also felt to be more economical, since there would be more efficient use of support services. Construction of these three complexes was planned to be completed in 1974-75. No reassigning of students in the affected attendance areas would take place until then.

The second technique applied at the elementary level was pairing and clustering, the latter being the term used when more than two schools merge their attendance areas. There would be four clusters and two sets of paired schools. In each case, attendance areas would be combined, improving the racial balance, and grade levels would be apportioned among the buildings in the pairing or cluster. Reassignment of pupils would also be delayed until the 1974-75 school year, in order to coincide with reassignment into the new elementary complexes.

With respect to the elementary level plan, the 1972-73 school year would be devoted to planning, the following year to staff development (human relations) and construction, and the next year (1974-75) to student assignment and implementation.

In addition to the three new complexes, several elementary schools were to be expanded. Thirteen schools would be demolished. The $19 million for this entire construction program was authorized by the 1969 State Legislature and would supposedly have been spent even if there had not been a court order. However, Superintendent Davis acknowledged that it would have been politically difficult, in the absence of the court order, to get voter approval of the necessary tax increase to finance construction. For that reason, among others, Davis considered the lawsuit as a good opportunity to get the money to do many things that he had wanted to do anyway.

At the secondary level, the plan relied on boundary changes and grade reorganization. Three senior high schools would be changed from grades 10-12 to grades 9-12. Five junior high schools would change from grades 7-9 to grades 8-9 only. One junior high school would become part of a grade 9-12 campus involving a snior high school. There would be several boundary changes at the junior high level. A boundary change between two senior high schools would be the only element of the plan with a forced impact at the senior high level, with the exception of adding grade 9 in three cases.

Three kinds of voluntary desegregation were offered as elements of the plan. Transfers between certain schools would be encouraged in order to improve racial balance. The existing magnet program at an inner city high school would continue to try to attract white students, with the possibility of starting a second magnet program at another high school with a large minority enrollment. In addition, special learning centers stressing multiracial activities and vocational training would attempt to attract students from schools not directly affected by the plan.

As with the elementary level plan, the 1972-73 school year would be devoted to planning. Some elements of the plan would be implemented the following year, and some would be put off until 1974-75. Staff training and development was also an important component of the secondary level plan.

The parts of the plan involving student assignment, the main thrust of the plan, would affect 42 of the 100 schools. The implication of the policy not to disperse minority students throughout the city was that most of the all-white schools on the outskirts of the city were unaffected. Ten thousand students would be bussed, at a cost of $1.3 million. One million of this would be paid by the State under the recently passed legislation. Staff training would come at a cost of $500,000.

The third section of the plan was devoted to "general program support." This was the place for the District to list everything that it was involved in, as a result of the human relations guidelines, that might conceivably be construed as related to the desegregation/integration effort. These included: the urban transfer program, the federally-funded Southeast Alternatives Program, curriculum development, administrative decentralization, faculty and staff development, programs funded under Titles I, III, and VIII of the Elementary and Secondary Education Act, annual sight counts by race, and affirmative recruiting activities. It should be noted that there was no plan component involving teacher assignment practices. This was seen by plaintiffs as a major weakness of the plan and even led them to question the supposed "good faith" of the District, since faculty assignment, unlike student racial balance, is totally within the control of the Administration. As mentioned, the court added a faculty assignment component to the order, at the suggestion of the plaintiffs' expert.

Court Modifications[2]

The court ordered that no more than 35 percent of the student body at any one school consist of minorities. Under the District's plan, several schools would have had 40 percent minorities. The court stated that "In light of the minority population of the District and the racial composition of other schools therein, the court feels these percentages are too high." The court went on to say that it was using the 35 percent figure only as a "useful starting point" and it should not be understood as reliance on fixed mathematical ratios.

For faculty integration, the court ordered that at the elementary level, there must be at least one minority teacher in every school before there are more than two minority teachers at any one school. This was proposed by the plaintiffs' expert witness. At the secondary level, the faculties must be integrated to the extent that each have approximately the same proportion of minority teachers as there are minority teachers in the whole district. The court ordered that faculty integration be completed by Fall 1973 with one-third of the integration accomplished by Fall 1972.

Other orders of the court were:[3] (1) the District shall not allow any transfers by principal's agreement or otherwise which have the effect of increasing the segregated nature of either school; (2) any construction or additions to old schools beyond that contemplated in the plan must be submitted to the court for approval; (3) any changes in the plan which would have the effect of increasing existing segregation or which would delay full implementation of the plan must be approved by the court; (4) the defendant must file semi-annual reports, until ordered otherwise by the court, showing the number of students and teachers by race for each school, the progress made in implementing the plan, and anywhere that implementation is not on schedule.

The plan did not address the District's optional attendance zones policy, nor did the court order modifications in that policy. But the District, in reaction to the court's finding that such a policy contributed to segregation, elected to eliminate most of the zones, claiming that the remainder had no effect on racial balance. The court addressed itself to the optional zones in its first supplemental order by requiring that all zones be eliminated within two years.[4]

An examination of these semi-annual reports and the supplemental court orders shows a history of troubled implementation, resulting largely from the District's piecemeal approach to desegregation. This is the subject of the next section.

VI. Implementation of the Order

The period since the initial order was rendered can be characterized by the following tendencies among the major actors. First, the School District. The District adopted a piecemeal approach to desegregation right from the start, always including the minimum number of schools in any one pairing or clustering in the attempt to comply with the 35 percent minority percentage requirement and adjusting boundaries to the minimum extent. This approach, along with changing housing patterns, declining majority enrollments, and delays in school construction, left the District always exceeding the 35 percent limit somewhere in the system, and often in many schools at once. (See Appendix B for the extent of segregation over the years.)

The District's strategy toward the court was to exploit Judge Larson's leniency in the face of "good faith" efforts. Whenever the District had to report noncompliance, it emphasized its good faith effort, the lack of violence during desegregation, and the continuing need for time and caution in approaching desegregation. Against this backdrop, it would ask the court for delays in meeting the 35 percent standard at whatever schools were giving trouble at the moment. (Faculty desegregation was accomplished very quickly, leaving pupil racial percentages the major subject of interchange among the parties.)

The plaintiffs have been continually urging Judge Larson to order more stringent measures such as mandatory inclusion of more schools in the plan, or the adoption of a new plan that would insure full compliance at an earlier date.

Judge Larson has continued his role as mediator. He has taken his direction as to how to view the District's actions from arguments by plaintiffs, and has given those arguments serious consideration. But he has been extremely lenient towards the District, usually granting their requests for delays and justifying such delays on the basis of the continuing "good faith" efforts of the District.

Meanwhile, the character of the School Board has been changing. The 1973 election brought two moderates to the Board that had been endorsed by CIE and other pro-integration forces in an attempt to prevent anti-integration candidates from winning. These two new members favored implementing the court order (as distinguished from the two members elected in 1971 that had vowed to fight the order), but were against doing any more than merely complying. In 1975, another Board member with considerably less dedication to desegregation than the 1967 Board had was elected leaving only two members with strong commitments to action, one of them black. Not only had the political orientation on the Board changed, but the spirit among Board members had changed as well. While the 1967 Board was close-knit and worked well together, the Board after 1971, and especially since 1975, has been quite the opposite, with little feeling of togetherness. Desegregation has been given a much lower priority by the Board, in deference to the concerns of the District.

Another major change in the schools was the departure of Superintendent Davis in 1975 to become President of Macalaster College in St. Paul. Davis apparently felt that he had accomplished what he had set out to in Minneapolis; he had seen the implementation of a major construction program, human relations emphasis, curriculum development, and alternative educational programs, all within the context of desegregating the schools. It is believed that he no longer enjoyed working with the School Board, as he had in his early years there. Replacing Davis was Ray Arveson, who came from the position of Superintendent of Schools in Hayward, California. Arveson was brought in to address financial problems of the District, reflecting this new orientation of the Board. Although he is not opposed to the desegregation effort, it is not a priority of his and he had done little to make it one of the rest of the administration or the Board.[1]

Specific mention of implementation problems began with the District's third semi-annual report to the court in December 1973 where it reported that six schools were out of compliance and asked the court not to modify the order. The District tried to mollify the court at the outset by stating that the plan has had better public acceptance than might have been expected "due in large part to the careful preparation and staff development which has gone into every phase of the Plan." The District blamed its problems on: (1) public housing projects that opened with much higher minority percentages than planned; (2) a drop in school enrollment much larger than predicted; and (3) delays in the construction of the three expanded community schools. The District argued that the lack of compliance was due to factors outside the school system, and that the racial concentrations in the school were thus *de facto*.

Another argument introduced by the District at this time that was to reappear frequently was that success depended on public support, and public support depended on stability within the plan. For the court to continually order modifications just to remedy some unanticipated minority concentrations would be "unwise and self-defeating" because it would upset the stability of the plan and increase the District's problems of winning the cooperation of the community.

A good example of the District's approach to meeting the court order is seen in its discussion of North High School, which had a 41 percent minority enrollment as of the third report to the court. The District pointed to three factors which would tend to lower minority percentages in the future: (1) as vocational centers are opened in other high schools, minority students will be attracted out of North; (2) the new building should attract majority students to North from other districts; and (3) the impact of moving the boundary of a feeder junior high school will begin to be felt at North in two more years. The District concludes that "for these reasons, and because the importance of maintaining stability in planning of attendance zones . . . we do not propose any changes in the plan although we recognize that North in 1974 may be slightly above 35 percent." Similar arguments were made in this report with respect to other schools that were currently out of compliance, but where expected trends and future actions gave some reason to expect the minority enrollment to decline.

Although the arguments used by the District to support its claim that minority percentages would decline were tenuous and meant that the schools would be out of compliance for several years, Judge Larson accepted the reasoning and ruled that, with one exception, no alterations in the plan were required. The one exception was a school where "unlike the situations existing at other schools, there are no offsetting factors that would tend to lower this percentage now and in the future."[2] For this school, Larson ordered that the plan be modified to assure that the projection of the minority enrollment for fall 1974 not exceed 35 percent. Larson did not say what changes should be made, but just indicated what the outcome had to be. This was the way he was to approach the problem of noncompliance generally. He never gave specific guidance as to what changes should be made.

Larson did deny the District's request for delays with respect to the three expanded schools for which construction had been stalled. He ordered that existing buildings be used in the meantime to achieve the 35 percent limit. This had been the original suggestion of the plaintiff's expert, Dr. Stolee. (The schools were not completed until 1976.)

Larson explained why he was being tolerant of some of the noncompliance by reminding the parties that the 35 percent figure had been taken as a "useful starting point." "At the time of trial in the spring of 1972, the overall minority student percentage in the District was 14.5 percent; it now has climbed to 17.7 percent. This development, combined with the nonrigidity of the 35 percent figure in the first instance, suggests that leeway may be tolerable for enrollment figures in excess of the 35 percent mark in certain circumstances."[3]

The District's response to the order that desegregation proceed without the new buildings was to use educational alternatives as a desegregation tool. A federally-funded alternative program had been implemented in one area of the city in 1971, and Superintendent Davis had wanted to use alternatives more fully in the system. This situation, and the desegregation order in general, gave the District added incentive to use this approach. In this case, the area that was to become the attendance area for two of the three new expanded community schools was made into one large attendance area and three kinds of education--continuous progress, open school, and tradition--were offered at various schools. Parents were given their first choice to the extent that this promoted racial balance.

The District's use of alternative education programs as a desegregation tool is significant in two respects. First, it provided a way to continue to desegregate the schools without forcing change on the community. Everyone in the school system feels that the use of alternatives was one of the main reasons why there was no hostile opposition to desegregation in Minneapolis.[4] The District was very reluctant to use any mandatory means to desegregate the schools, and with alternatives, it could offer parents and students a choice of school, a far cry from mandatory, crosstown bussing. Thus, even those parents who were opposed to desegregation could not feel that the District was ignoring their interests or the interests of their children.

Second, the reliance on alternatives to comply with the 35 percent order served to perpetuate the pattern as one where the District was continually having to ask the court to grant delays in meeting the 35 percent limit. Unlike mandatory assignment, with alternatives it was impossible for the District ever to know exactly how many students of each race would be enrolled in each school. This kind of gave legitimacy to its faulty planning, and to its pattern of reporting, after the fact, that its predictions had been incorrect, leaving some schools out of compliance. It seems that this strategy was particularly effective with Judge Larson, whose concern for cooperation probably left him sympathetic to the District's concern for giving parents a choice of school.

By the time of the fifth report to the court in January 1975, alternatives had become the major strategy of the District in its attempt to balance enrollments by race. The number of schools out of compliance with the 35 percent order had grown to ten elementary schools, two junior high schools, and one high school. It was suggested that alternatives would remedy this situation, but at an indeterminate future time. For example, one of the clusters had a minority enrollment of 47.3 percent. An alternatives task force was formed to make recommendations to improve the situation, and the District proposed to submit a plan to the court in April.

> We cannot guarantee at this time to present a plan in April which will reduce each school to 35 percent. We assure the Court, however, that we will have a thoughtful plan geared to integration, improved education and effective community school relations which take into account the multiple complex problems in this area.

With respect to the two expanded community school areas where alternatives had been implemented in the existing buildings, the District reported that the minority enrollment had been equalized at 40 percent in each of the six schools. It claimed that 35 percent could not be achieved until the new buildings provided the added capacity to attract majority students from outside the area. The District stated that it could not promise to be in compliance in 1975, but that the magnet effect of alternatives would reduce the minority percentage in 1975 and again in 1976.

> We urge that no changes be required in the program for 1975-76, so that we can have at least that year to study the extent of the magnet effect. In other words, to the extent possible, we want to fill the excess capacity in the new schools on a voluntary basis rather than by arbitrarily enlarging the area.

This report to the court is a good example of the language used to substitute for reporting favorable accomplishments. The report began with a statement that the District felt pride in what had been accomplished and felt gratified "that other cities have looked to Minneapolis to see what has made it possible for us to reach our present stage of desegregation/integration with as little conflict as we have had." It ended as follows:

> We believe that the District continued to demonstrate its commitment to desegregation/integration. We believe further that the past three years have shown the importance of planning, of training staff, and of involving students and parents in the whole process. We believe the District has shown its sincerity in pursuing desegregation/integration, and its skill in accomplishing the changes required. . . .
>
> The original Court Order does not specify the length of time for which the Court reserves jurisdiction and requires semiannual reports, but we believe that Court and counsel should now think in terms of ending this supervision not later than January 1, 1976.

Plaintiffs registered their objection to this approach by requesting a court order requiring the School District to submit a new plan that would ensure compliance in all schools by the beginning of school in 1975. Quaintance, attorney for the plaintiffs, urged Larson not to wait for voluntary mixing, which was "not in the cards."[5] Defendants had argued, with respect to the cluster that was furthest out of compliance, that the continuous progress alternative program could remedy the imbalance by attracting 75 majority students in and encouraging 75 minorities to transfer out.

Quaintance pointed out to Larson that the same alternative program was offered in 1974 and attracted only four majority students. He claimed that an alternative approach would fail because the school is identifiably black, and urged that another school with a majority enrollment of 94 percent be added to the cluster.

Larson addressed this question in his Court Order of May 7, 1975. Assuming his mediator role, Larson said that both Quaintance's argument, and the District's concern for stability in their educational programs, had merit; and then ordered a kind of compromise. He did not grant the District's request for a delay:

> Although the Court has been inclined to resolve doubts as to anticipated enrollments in favor of the School District's projections, it will not do so in regard to Bethune. That school is a constant reminder of the segregationist policy of the District in the 1960s. The injury resulting from that policy has never been adequately remedied.[6]

But neither did he grant the plaintiffs' requests to order a new plan assuring all schools be within 35 percent and to order the inclusion of the majority white school in the Bethune cluster. Instead, Larson revised the 35 percent standard to a limit of 42 percent total minority enrollment per school, with no more than 35 percent of any single minority. Larson cited as the main reason for this new 35/42 percent standard the growth in Indian enrollment along with the overall decline in enrollments. (Indian school population had grown 14 percent since 1972 and 80 percent since 1968.) As is the case with all of Larson's orders, this change was made in response to concerns of the parties:

> Plaintiffs and defendants have urged the Court to take cognizance of the District's growing minority population, and of the diversity within that population, by setting separate limits for a single minority and for the total minority population on any school campus. The Court is aware that Native Americans and Blacks are distinct minorities with strong identities and very different historical experiences.[7]

The use of this new standard brought every school except the Bethune cluster into compliance. Although Larson warned that the District had to have some contingency plans ready in some cases where schools were just barely in compliance, he found no further modifications to be necessary, except for Bethune. Showing his reluctance to order specific means to achieve compliance, Larson refused to order a new school into the Bethune cluster, and instead ordered simply that the District provide a plan in 10 days that would ensure that each school in the Bethune cluster would be within the 35/42 percent limit by September 1975. This order was tantamount to ordering that the majority school be added, which is in fact what the District did in response to the order, since their voluntary plan to bring Bethune into compliance would have taken two years.

In the following years, only the West area, of the three decentralized pyramids, was able to achieve a stable situation of compliance. Quaintance attributes this to the fact that the West Area Superintendent, a black, was bold and willing to make the necessary tough decisions, such as closing white schools.[8] The North Area, which had one high school (North High) with 47 percent minority, proposed a new approach called programmatic desegregation in 1976. Under this plan, students in three high schools would take courses at any of the three schools, and the minority enrollment at each school would be averaged over the periods of the school day. The

District requested that the Court allow North High to remain out of compliance for one year while they tried programmatic desegregation. Against the strong protest of the plaintiffs, Larson granted the motion. The first year experience with this program saw minority enrollments fall somewhat at North, but not below the 35/42 percent limit.

Judge Larson's acceptance of the programmatic desegregation proposal made Quaintance and others such as CIE members really feel that he had gone too far in his leiency with the District. The two neighboring high schools to North had very small minority enrollments, and some system of two-way bussing could have remedied the situation at North. But this was something the District simply would not do, and Larson, probably knowing that this was the only real alternative, was not willing to order it, especially when the District had come up with its own alternative.

It is becoming increasingly clear to all parties that within the bounds that the desegregation drama has been played out to date, there is little chance of ever achieving full compliance. Plaintiffs have become quite frustrated with the approach of taking one school at a time, while others slip over the limit. Defendants have motioned the Court to drop jurisdiction, claiming that they have done all they can to remedy the segregation that existed at the time of the trial. The Board is trying to turn its attention to other matters. In its January 1977 report to the Court, the Board decided not to submit suggestions as to how to better the racial balance. Said one member of the Board: "It's the housing patterns in the city that's screwing us up. Let him (Larson) figure out how we should do it." Only one Board member is opposed to trying to get the Court to drop jurisdiction. Said this member, "Judge Larson in my opinion has been a partner in this desegregation-integration venture. He's given us full leeway to implement our plans. He's been willing to sit down and work with us. I'd be in favor of continuing to work out our plan and bring to the judge our areas of concern."

Newhall, attorney for the District, had encouraged the Board not to ask the Court to reconsider a dismissal of the case in light of Dayton, saying that Dayton had fewer segregation acts and a more sweeping remedy. The Board ignored Newhall's advice and Larson, while refusing to officially reconsider, indicated that the principles governing the Minneapolis case had not been changed by Dayton. The District hired a second attorney, motivated by what seems to be discontent with Newhall's unwillingness to try to get the Court to drop jurisdiction. Larson told the District that it should appeal the recent order for full compliance by Fall 1978 and the refusal to drop jurisdiction, if it thought it could successfully challenge his use of legal precedent, but the Board let the deadline for appeal pass.

In its report of January 1977, the District urged that jurisdiction be dropped since all schools have been in compliance at one time or another since the original order. It advised the Court that it may move for dismissal of the action in light of Austin and Pasadena. In its responding order, the Court said that Pasadena did not apply in this case since there was a time when all Pasadena schools were in compliance. The Court said that while it "remains convinced that the defendants are operating in good faith in this matter, it cannot find that the defendants have yet fully complied and will retain jurisdiction until they have done so."

In a recent interview, Larson stated that he plans to retain jurisdiction until all schools are simultaneously in compliance with the court standards, in spite of the fact that he is tired of the case and wants to bring it to a conclusion. He added that if he had it to do over again, he would have ordered integration for the entire school system rather than ordering integration only in certain schools.

Larson's order of July 11, 1977 shows the meaninglessness after six years of the mediating position. Larson (1) denied defendants' motion to terminate the litigation; (2) denied plaintiffs' request for an order requiring defendants to submit a different desegregation plan; and (3) ordered that defendants' plans for continued desegregation be altered to provide for full compliance by Fall 1978. Without a new and different desegregation plan, and without some explicit orders from the judge, it seems a safe bet that the District will have some "good faith" explanation why it is unable to comply when Fall 1978 comes around. It seems that the only thing that can give at this point is Larson's leniency in accepting the District's excuses and delays. Given his commitment to seeing desegregation actually happen in his own city, his retired status and poor health, one has to wonder if he isn't about to have a change of heart.

POSTSCRIPT - AUGUST 1979

The School District, in its January 1977 semiannual report, had urged the Court to drop jurisdiction of the case. The court denied the request, stating that the District had never fully complied with the Court Order, and ordered that the District comply by fall 1978.

In its next report, the Board included no specific plans for meeting the fall 1978 deadline. This reflected the defiant attitude of the now conservative board that if the court wanted compliance, the court should figure out how to achieve it. After the attorney for the school board, Newhall, signed a statement admitting that the district had taken no steps toward meeting the fall 1978 deadline, the plaintiffs filed for contempt of court.

The district countered with a motion for the court to: (1) drop jurisdiction of the case, or alternatively, (2) raise the 42 percent-35 percent limit by 8 percent to allow 50 percent total minority enrollment in a school as long as no more than 43 percent were of the same race. The alternative motion also requested that special exceptions be granted for schools with high Indian enrollment.

Plaintiffs agreed to withdraw their motion for contempt and to instead have a hearing on the defendant's motion. Following the hearing, Judge Larson refused to drop jurisdiction, but did agree to raise the percentage limit; but by 7 percent rather than the 8 percent requested. Larson refused to allow special exceptions in cases of large Indian enrollment. Larson ordered that those new percentages be met in both fall 1978 and 1979. He made it clear that he had allowed the newly-relaxed standards only very reluctantly.

The district sought a stay of the court order pending appeal. The stay was denied by the Court of Appeals, and the Supreme Court. The district then appealed the order. In the meantime, since the stay was denied, the district adopted a new plan which added some schools to the desegregation plan and limited minority enrollment at those schools with large percentages of minorities.

In September 1978, the Court of Appeals affirmed the District Court's order. In June 1979, the United States Supreme Court denied the school district's petition for a writ of certiorari. The attorney for the school district, Newhall, had advised against both the appeals, both because he felt there was no chance of having Larson's order overturned and because of the expense. As a result, Newhall was dropped as counsel for the desegregation suit. As of this date, the district remains under order, but out of compliance.

MINNEAPOLIS PUBLIC SCHOOLS
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SUMMARY STATISTICS BY RACIAL/ETHNIC CATEGORIES FROM 1969 TO 1980

PUPILS

RACIAL/ETHNIC CATEGORY*	1969		1970		1971		1972		1973		1974	
	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
INDIAN AMERICANS	1,843	2.7	1,993	3.0	2,225	3.4	2,352	3.8	2,545	4.3	2,676	4.8
BLACK AMERICANS	5,528	8.1	5,944	8.9	6,351	9.7	6,542	10.6	6,882	11.7	7,040	12.5
ASIAN AMERICANS	347	0.5	329	0.5	354	0.5	352	0.6	386	0.7	423	0.8
SPANISH SURNAMED AMERICANS	448	0.7	461	0.7	536	0.8	567	0.9	615	1.0	583	1.0
ALL OTHER AMERICANS	60,112	88.0	58,207	87.0	55,735	85.5	52,076	84.1	48,405	82.3	45,439	80.9
TOTALS	68,278	100.0	66,934	100.1	65,201	99.9	61,889	100.0	58,833	100.0	56,161	100.0
(TOTAL MINORITY)	8,166	12.0	8,727	13.1	9,466	14.5	9,813	15.9	10,428	17.7	10,722	19.1

1975 REVISED RACIAL/ETHNIC CATEGORY**	1975		1976		1977		1978		1979		1980	
	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
INDIAN AMERICANS	2,792	5.1	2,759	5.3	2,658	5.4						
BLACK AMERICANS	7,492	13.7	7,963	15.2	8,090	16.4						
ASIAN AMERICANS	571	1.1	636	1.2	663	1.3						
HISPANIC AMERICANS	598	1.1	576	1.1	626	1.3						
WHITE AMERICANS	43,160	79.0	40,468	77.2	37,269	75.6						
TOTALS	54,613	100.0	52,402	100.0	49,306	100.0						
(TOTAL MINORITY)	11,453	21.0	11,934	22.8	12,037	24.4						

*RACIAL/ETHNIC CATEGORIES ARE DEFINED BY DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, OFFICE FOR CIVIL RIGHTS.

**RACIAL/ETHNIC CATEGORIES AS ANNOUNCED BY THE NATIONAL CENTER FOR EDUCATIONAL STATISTICS.

FTR:ve
11-12-77

MINNEAPOLIS PUBLIC SCHOOLS
INFORMATION SERVICES CENTER

SUMMARY STATISTICS BY RACIAL/ETHNIC CATEGORIES
FROM 1969 TO 1980

PERSONNEL

RACIAL/ETHNIC CATEGORY*	1969		1970		1971		1972		1973		1974	
	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
INDIAN AMERICANS	32	0.5	40	0.8	46	0.7	53	0.8	94	1.3	98	1.4
BLACK	355	5.8	395	6.1	439	6.5	514	7.6	569	7.9	523	7.7
ASIAN AMERICANS	20	0.3	22	0.3	23	0.3	30	0.4	37	0.5	31	0.5
SPANISH SURNAMED AMERICANS	10	0.2	16	0.2	26	0.4	21	0.4	34	0.5	29	0.4
ALL OTHER AMERICANS	5,746	93.2	5,956	92.5	6,198	92.1	6,190	90.9	6,438	89.8	6,138	90.0
TOTAL STAFF	6,163	100.0	6,437	99.9	6,732	100.0	6,808	100.0	7,172	100.0	6,819	100.0
(TOTAL MINORITY STAFF)	417	6.8	481	7.5	534	7.9	618	9.1	734	10.2	681	10.0

1975 REVISED RACIAL ETHNIC CATEGORY**	1975		1976		1977		1978		1979		1980	
	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
INDIAN AMERICANS	87	1.3	98	1.5	117	1.9						
BLACK AMERICANS	510	7.7	457	7.1	481	7.6						
ASIAN AMERICANS	35	0.5	26	0.4	32	0.5						
HISPANIC AMERICANS	25	0.4	29	0.4	28	0.4						
WHITE AMERICANS	6,005	90.1	5,806	90.5	5,635	89.5						
TOTAL STAFF	6,662	100.0	6,416	99.9	6,293	99.9						
(TOTAL MINORITY STAFF)	657	9.9	610	9.5	658	10.5						

*RACIAL/ETHNIC CATEGORIES ARE DEFINED BY DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, OFFICE FOR CIVIL RIGHTS.

**RACIAL/ETHNIC CATEGORIES AS ANNOUNCED BY THE NATIONAL CENTER FOR EDUCATIONAL STATISTICS.

FTR:ve
11-12-77

APPENDIX B

Extent of Segregation, 1972-1978

Part 1: Number of schools out of compliance with Court-ordered desegregation.

January, 1974: 6 schools have minority enrollments of over 35%.

January, 1975: 13 schools have minority enrollments of over 35%.

(10 elementary, 2 junior high, 1 high school)

All schools exceeding the court-imposed 35% standard have minority enrollments of between 35-45%.

January, 1976: 6 schools are minimally out of compliance with the new court standard of 42% total minority, 35% maximum of any single minority.

(3 elementary, 2 junior high, 1 high school)

July, 1976: Only 1 school, a high school, is out of compliance. That school has an enrollment that is 47% minority and 40% black.

January, 1977: 9 schools are out of compliance.

(6 elementary, 2 junior high, 1 high school)

Schools exceeding the court standard have total minority enrollments of about 42-50% and single minority enrollments of about 35-45%. None are excessively out of compliance.

1977-78: About 15 schools are out of compliance.

Source: All data except for 1977-78 are from the semi-annual reports submitted to the court by the School District. The 1977-78 figure is an estimate given by Judge Larson in a telephone interview on 3/20/78.

APPENDIX B (cont.)

Part 2: Comparison of segregation, 1971-72 and January, 1977.

	1971-72	1977
Total enrollment	65,000	52,000
% minority	15%	23%
% black	10%	15%
% Indian	3%	5%
Elementary schools		
% of minority students in schools with minority enrollment greater than 30%.	55%	32.5%
% of white students in schools with minority enrollment less than 5%.	74%	37%
# of schools with less than 5% minority enrollment.	27	5
# of schools with greater than 30% minority enrollment.	13[1]	26[2]
Junior High schools		
% of minority students in schools with more than 30% minority.	68%	57%
% of white studenst in schools with less than 5% minority.	63%	22%
High schools		
# of schools with greater than 30% minority enrollment.	2	3
# of schools with less than 5% minority enrollment.	4	1

---

[1] Three schools had minority enrollments greater than 70%.

[2] Most of these had minority enrollments of about 40%.

Source: Ninth semi-annual report from the School District to the Court, January, 1977.

NOTES

I. The City of Minneapolis

1 Sources for this section are 1) Nicholas Allan Fischer, Desegregating and Integrating the Minneapolis Public Schools: the Politics of American Education as Seen From Within, a Ph.D. dissertation for the Graduate School of Education at Harvard University, 1977, and 2) The Twin Cities Perceived, University of Minnesota Press, 1977.

II. The Minneapolis Public School System

1 Minneapolis Public Schools, "Participant Reactions to Project 822 Human Relations Training, Summer 1970," March, 1971, p. 3.

2 Fischer, p. 71.

3 Data through 1970 is from Minneapolis Public Schools, "Participant Reactions...", more recent data was obtained by telephone from the School District.

4 Information in Tables 3 and 4 is from Minneapolis Public Schools Information Services Center, Pupil - Personnel Sight Count, as of October 11, 1977.

5 Fischer, p. 75.

6 Quotation is from Stuart Rider, cited in Fischer, pp. 159-60.

7 The following information on individual school board members is from Fischer, pp. 83-86.

III. The Beginning of Desegregation: 1967-1971

1 The activities described in this paragraph are presented in Minneapolis Public Schools, Desegregation/Integration: Equal Educational Opportunity, 1971.

2 Minneapolis Tribune, 11/26/70.

3 Ibid.

IV. The Trial

1 Interview with Barbara Schwartz, 12/30/77.

2 Ibid.

3 Ibid.

4 351 F. Supp. 799.

5 Ibid., at 802.

6 Minneapolis Tribune, 8/11/71.

7 Minneapolis Star, 4/10/74.

8 Ibid.

9 Interview with Dr. Clifford Hooker 12/21/77. Now the State standard of 30% minority is more stringent than the court standard of 42% maximum minority enrollment in any school, but no one is concerned about being over the State standard if and when Court jurisdiction is dropped. This shows the limited impact that the State desegregation standards have had on the School District.

10 Biographical information on Judge Larson is from an article in the Minneapolis Tribune of 5/11/77, and another article by Bob Lundegard of the Tribune Staff called "Judge Larson: Quiet Man Amid Controversy," the date of which is unclear on the xeroxed copy received from the Tribune.

11 Interview with Mike Freeman, 12/31/77.

12 Ibid.

13 Interview with Norman Newhall, 12/28/77.

14 From the Complaint filed by plaintiffs in 1971.

15 Ibid.

16 Ibid.

17 Ibid.

18 Interview with Barbara Schwartz

19 Interview with Charles Quanitance, 12/27/77.

V. The Plan

1 Minneapolis Public Schools, Desegregation/Integration: 1972/1975, Proposals for Consideration Based on the 1970 Human Relations Guidelines, adopted, as amended, April 25, 1972.

2 351 F. Supp. 810. This was part of the original order.

3 Ibid., pp. 810-11.

4 Memorandum Order for Supplemental Relief, May 8, 1973, p. 6.

VI. Implementation of the Order

1 Interview with Quaintance.

2 Memorandum Order of April 24, 2974, p. 6.

3 Ibid., p. 3.

4 Interviews with Hooker, Newhall, and Robert Williams, the latter on 12/22/77.

5 Interview with Quaintance.

6 Memorandum Order of May 7, 1975, pp. 4-5. This is the first mention, in the five Court Orders since 1972, of the relationahip between the remedy and the wrong.

7 Ibid., p. 2.

8 Interview with Quaintance.

9 Interviews with Quaintance and Schwartz.

INTERVIEWS

Harry Davis, Vice President for Urban Affairs, Minneapolis Star and Tribune, former School Board Chairman, School Board member, 1969 to present, 12/28/77.

Mike Freeman, former law clerk for Judge Earl Larson, 12/31/77.

Archie Holmes, Director of the Equal Educational Opportunities Section of the Minnesota Department of Education, 12/28/77.

Dr. Clifford Hooker, Dean of College of Education at University of Minnesota, former Acting Assistant Superintendent for Secondary Education, Minneapolis Public Schools, 1970, 12/21/77.

Judge Earl Larson, U.S. District Court, telephone interview, 3/20/78.

Norman Newhall, Attorney for School Board, 12/28/77.

Gregor Pinney, Education Reporter, Minneapolis Tribune, 12/29/77.

Rev. David Preuss, President, American Lutheran Church, former School Board member, 1965-1974, 12/22/77.

Charles Quaintance, Attorney for plaintiffs, 12/27/77.

Dr. Robert Williams, Assistant Superintendent for Intergroup Relations, Minneapolis Public Schools, 12/22/77.

Barbara Schwartz, former Chairman of Committee for Integrated Education, 12/30/77.

John Warder, President, Plymouth National Bank, former School Board member, 1964-1969, 12/28/77.

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ATLANTA

Nancy Borow

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I. The Setting: Atlanta

Introduction

Even a brief visit to Atlanta reveals its distinct character. Atlanta is a bustling metropolitan center, proud of its growth, its reputation as the enlightened center of the South, and its tradition of leadership by cooperation. The city experienced a tremendous economic boom in the 1960s and new construction still continues apace. Presiding over the city's growth has been the powerful business elite, the leadership of which has only recently begun to be challenged by the black community. Atlantans speak openly and without embarrassment of the "white power structure" and the "black power structure," the former guarding the purse strings of the city, the latter running city hall since 1973. The white power structure is more conspicuous to the outside observer, who need only gaze up from the downtown streets at the names atop the shiny new office buildings. But the shape of its power is changing with the emergence of black political control. The transition to a black-controlled city has been smooth. Atlantans attribute this to the enlightened character of the white power structure and the tradition within Atlanta of working out problems through a spirit of cooperation.

Given the pride and character of Atlanta's leaders, the school desegregation saga is a sad one. It is the story of the failure of the cooperative spirit to solve the problem at hand. As one participant in the drama put it, "in Atlanta we are used to saying 'we can', and here was a situation where we just couldn't."[1] Black and white leadership cooperated and made concessions. But the outcome was not satisfactory to anyone. Yet since the majority of the local actors in the 18-year drama blame outside forces for the failure, the belief in progress by cooperation is likely not to have been shattered by the desegregation ordeal.

Background

Atlanta was founded in 1837 by railroad builders at the junction of four small eastern railroads and a western trunkline. It became the State capital of Georgia in 1868, four years after the city was burned by Union troops in the Civil War. The population of the city alone is about 500,000. Its metropolitan area has 1.6 million residents and is the 18th largest metropolitan area. About 60% of the city population and 22% of the metropolitan area population is black.

Atlanta is both an economic and educational center of the south. The city houses regional offices for 432 of Fortune Magazine's top 500 companies. It is the home of Emory, Oglethorpe, Georgia State, and Georgia Tech universities, and the six predominantly black colleges that together form Atlanta University Center. Atlantans like to boast that "no matter which direction a Southerner goes after he dies, he will have to change planes at Atlanta."[2]

The black population began to grow after World War II, as blacks from rural communities sought jobs in the city. Atlanta had a reputation as a good place for blacks in the post-war era. There were jobs available and segregation was less harsh than in other parts of the south. The mayor, William Hartsfield, who had been in office since 1937 and was to remain until 1962, stressed the need to build housing for blacks in the many vacant areas of the city.[3]

Mayor Hartsfield, in his 25 years in office, represented the interests of the business community, led by the Coca-cola family, Woodruff. The economic power structure has made decisions "for as long as anyone remembers."[4] Its vehicles have been the Chamber of Commerce and an organization called Central Atlanta Progress, Inc., composed of businessmen whose objective is to defend downtown interests. Throughout his incumbency, Mayor Hartsfield dealt with the black population through only a few of its leaders. In reference both to the city's rapid business expansion and its calm political environment, Hartsfield coined the city's slogan which is still in use today--"a city too busy to hate."

Hartsfield was succeeded in 1962 by Ivan Allen, Jr., another business representative who spearheaded the economic surge for eight years. It was during his incumbency that the greatest population shift occurred. 60,000 whites moved out of the city and 70,000 blacks moved in. At one point Allen succumbed to white pressure against the incursion of blacks into white residential areas by actually having barriers erected in the streets to deter blacks from crossing them. The barriers were ordered removed by the court but not until they had been the target of press coverage. Said former mayor Hartsfield, "I've made many mistakes, but never any that could be photographed."[5]

By the end of the 1960s the political winds had begun to change direction and a liberal, Jewish mayor was elected in 1970. Massell defeated his conservative opponents by putting together a coalition of blacks, blue collar whites, and white liberals. He named three blacks to head city departments. But Massell's term was marred by scandal and he was defeated by his Vice Mayor, Maynard Jackson, in 1973. Jackson, a young black only 39 years old at the time of his election, campaigned on the issues of law and order and concern for the city's poor. He received 59% of the vote, including 22% of the white vote. Jackson got considerable support from the business community, which was dissatisfied with Massell. The same election in which Jackson came to office saw blacks gain control of the School Board and win half the seats on the city council. 1973 marked a significant change in the political position of blacks in Atlanta.

Blacks in Atlanta

The first stirrings of black leadership came in the late 1940s when attorney A.T. Walden, YMCA Director Warren Cochran, and John Wesley Dobbs (grandfather of Mayor Jackson) formed the Atlanta Negro Voters League. This group was joined by black preachers, including Martin Luther King, Sr., to form the black "old guard."[6] Their primary operating vehicle was not the NAACP but the Butler Street YMCA--the only autonomous black YMCA in the country. It was like a black chamber of commerce. Younger blacks were frozen out of this social and economic elite group.

A new generation of black leaders began to emerge in the 1960s around the sit-in movement. In 1960 Martin Luther King, Jr. led a student sit-in at the lunch counter of Rich's Department Store. The black community called off the pickets and boycotts when the city government agreed to integrate all stores and restaurants by the fall. 1960 also brought Atlanta blacks a new liberal newspaper, the Atlanta Inquirer, to balance the conservative black paper, the World. The Inquirer was founded by a group of blacks which included Jesse Hill, now one of the most influential blacks in the city as president of the Atlanta Life Insurance Company, the largest privately held black business in the U.S., and president of the Atlanta Chamber of Commerce. Julian Bond, now a Georgia State Senator, was an early editor of the Inquirer, which supported the sit-ins and provided a voice for the young black generation.

It was the new black political elite that first achieved political control of the city. Maynard Jackson began his political career without the help of the "old guard," which was accustomed to selecting Atlanta's black politicians. As a result, Jackson took office amidst a certain amount of resentment on the part of the "old guard."[7]

In 1974 Ebony Magazine proclaimed Atlanta a mecca for blacks.[8] Atlanta provides business opportunities for blacks that would be inconceivable anywhere else, the article stated. It is not surprising that the city with perhaps the strongest black leadership (it is the home of Martin Luther King, Jr. and the Southern Christian Leadership Conference) may be considered one of the better living environments for blacks.

Yet blacks in Atlanta dispute the claim that the black good life is in Atlanta. An article in the Atlanta newspaper, the Constitution, on the tenth anniversary of Martin Luther King's death (April 4, 1978) assessed the progress that Atlanta blacks had made in the last ten years. It reported that blacks tend not to share whites' belief that there has been considerable progress:

> Whites generally talk about great strides for blacks in politics, in the desegregation of downtown Atlanta and in race relations. Blacks point to segregated schools, housing, churches and social clubs, and complain bitterly about their failure to get more than crumbs from the crust of the economic pie.
>
> This gulf may explain how white business leader Dan Sweat could say, "I can see light-years (of change) since King forced the doors open," while at roughly the same time three blocks away, Vivian Malone Jones of the Voter Education Project was shaking her head:
>
> > "Any little crumb you get in this country as a minority, you have to fight for tooth and nail. The system has just not opened up, and that goes across the board."

There is no dispute that blacks are economically worse off than whites in Atlanta. Black unemployment in the city is currently about 16%, about 2-1/2 times the white unemployment rate. And while 33% of whites with jobs work in professional, technical or managerial areas, just over 11% of working blacks hold such jobs.[9]

At the same time, blacks have made considerable gains in the political arena. Ten years ago the mayor, vice-mayor, 15 of the 16 aldermen, and all of the city department heads were white. Today the mayor, City Council president, 9 of 18 councilmen, and four of the eight department heads are black.[10] In 1968 Atlanta's Chamber of Commerce had just been desegregated--by mistake. A routine invitation was accidently sent to a black contractor, who quickly accepted. There were only a few black Chamber members. Today the Chamber president is black, although blacks account for only 10% of the membership.

Black leaders feel that the progress that has occurred has left both blacks and whites with a feeling of complacency. Said Lyndon Wade, the director of the Atlanta Urban League:

> We have created a mind-set that says we are free from the evils of other cities, but there's not much substance to that. I'm not saying we should flail ourselves, but we have tended to give off much more rhetoric than substance.
>
> A lot of white folk say, "Our black folk are better than your black folk." That makes it easy for a lot of people on the cocktail circuit not to face the issue.
>
> If you compare us to a lot of places, we're doing well. But we're still essentially two cities.[11]

An important change of attitude toward integration has accompanied the city's transition to a majority black city under black political leadership. Increasingly, black leaders in Atlanta are offended by the notion that integration is a necessary part of progress and of quality in life. This attitude is fostered by the pride of black leaders who went to black schools, attended black colleges, and who got where they are today with no assitance from an integrated society. They object to the integration philosophy, which implies that they would be better or smarter had they come via integrated channels to their positions of leadership. They are more concerned with improving the lot of Atlanta's blacks than with integrating blacks into a dwindling white city culture.

This change in black attitudes has thrown the old alliance between the white and black leadership off balance. A June 1975 article in the New Republic treated the changing power relationship in some detail and a major portion of that account is reproduced below:[12]

> Meanwhile the old alliance between the power structure and Atlanta's blacks was falling on hard times. It was an alliance based, in large measure, on the presence in the city of a small community of black businessmen and professionals, many of them the product of the local black colleges, who had bourgeois aspirations and political skills. Their influence acquired some meaning when blacks, after the Supreme Court began dismantling voting barriers during the World War II era, started to vote in important numbers. By the 1950s black voters provided the margin of victory in the ongoing political struggle between middle-class and redneck whites in Atlanta, and by the end of the 1960s black voters were in a majority. For the power structure the product of the alliance was efficient, business-oriented political leadership. The black bourgeoisie got an Atlanta that moved further and further from the repressive racism practiced in the rest of the South. It was only after the black poor began to distinguish their interests from those of the black elite that the old alliance between blacks and the power structure started to show signs of strain.
>
> These signs emerged spectacularly in the 1973 election, less in the race for mayor than for president of the city council. The power structure thought it had made a deal with the black elite, in which it supported Jackson for mayor in return for the black votes necessary to elect Wade Mitchell as city council president. Mitchell was the kind of man the power structure was accustomed to bestowing upon the city, a banker and conscientious member of the board of aldermen, a rich man but very liberal on racial issues. Also running was Wyche Fowler, a liberal white attorney who was chiefly distinguishable from Mitchell in strongly opposing expressway construction. The third major candidate was the Rev. Hosea Williams, a former associate of Dr. Martin Luther King, a dynamic and articulate man, and the self-appointed tribune of the black masses.
>
> Williams, of course, refused to be bound by the deal made by the black elite, and campaigned fiercely against the wealth of the downtown establishment. In the primary Fowler came in first, thanks

> mostly to the anti-expressway vote. Mitchell, the early favorite, could get only 30 percent of the white vote and barely a quarter of the black, and was eliminated from the runoff. Right behind Fowler came Hosea Williams, with a majority of the black vote and a surprising 20 percent of the white. In the general election Williams did not appreciably improve his position, and in some precincts, both black and white, his vote actually declined. What the Williams vote seemed to indicate was that the black electorate, and in some measure the white, was anxious to send the power structure a message, but did not necessarily want him to win. Given the "whither Atlanta" phenomenon that has since ensued, it's a message the power structure seems to have received, though perhaps not deciphered.
>
> What the deciphering will surely yield is a recognition that blacks have acquired a new understanding of political purpose. If they once found power flattering to the collective ego, they are now disabused of such a superficiality, and consider power meaningless except as an instrument of collective economic advancement. The Atlanta Constitution, still the power structure's loudest voice, last month quoted without contradiction a black establishment leader's claim that the white minority owns 97 percent of Atlanta's wealth. Hosea Williams further argues, producing scattered shreds of evidence, that the power structure, not satisfied with what it has, is out to get what little remains to blacks. At least one of the power structure's members sees the situation in much the same terms. "It has been traumatic," said Richard Kattel, chairman of the huge Citizens and Southern National Bank, "having the black community with the political strength and the white community continuing to hold the purse strings." The paradox puts a great deal of pressure on Maynard Jackson, who knows it is not easy for a mayor to translate political power into a redistribution of income, or of wealth. He has trouble enough keeping upright, as he tries to maintain his balance among his several constituencies. Naturally enough, occasionally he slips and falls.

An understanding of Atlanta's changes in recent years with respect to race relations is important to a study of the school desegregation story. The lawsuit to desegregate the city's public schools was filed in 1958 and was not settled until 1975. And now there is a lawsuit pending that seeks to integrate Atlanta's schools with surrounding suburban school districts. Over this period the percentage of blacks living in Atlanta increased from 38% to 60% and black enrollment in the public schools climbed from 30% to about 85%. Blacks went from exclusion from white society to limited participation at the discretion of the white ruling elite, to a position of considerable power.

The Atlanta Public School System

The Atlanta Public School System (APSS) is an independent school district, unlike the majority of school districts in the state which are operated by the counties. Until recently, state law prohibited independent school districts from receiving state money for transportation. When the controversy over busing began in 1971, the APSS owned no buses and had never transported students.

There are ten School Board members, nine elected to represent individual wards and one elected at-large. All ten are elected city-wide at once. Terms are for four years. The Board presently has a majority of black members, but throughout the desegregation litigation the number of blacks on the Board varied from two to three. The first black was elected to the Board in 1950.

A woman, Ira Jarrell, served as superintendent of schools from 1944 to 1960. She was succeeded by John Letson who served until he was replaced by a black under the terms of the final desegregation agreement. Letson, a conservative who resisted desegregation, had considerable control over the School Board, at least until the early 1970s. The Board was largely a "rubber stamp" for Letson's policies. The attorney for the Board until his death in 1971 was Pete Latimer, a former chairman of the School Board. Latimer had close ties to the white business community and kept the APSS and the business community closely allied. Under the new superintendent, Alonzo Crim, the Board is much less tightly under the control of the administration. Under the superintendent are six area superintendents, one for each of the six geographic areas into which the APSS is divided.

When the lawsuit began in 1958 blacks constituted 30% of the total enrollment. By 1964 enrollment was 50% black; in 1971 it was over 70% black; today it is 85% black. Over that period total enrollment declined from a peak of 115,000 to its present size of 80,000. White enrollment has declined by about 45,000. The Appendix shows enrollment figures from 1960-1975 including the extent of desegregation each year.

II. Overview of the Litigation[1]

The First Phase: 1958-1971

The desegregation suit against the Atlanta Board of Education was filed in January, 1958 by the NAACP Legal Defense Fund (LDF). After a motion by the Board of Education to dismiss the litigation was denied, the case was brought to trial for the first time in June, 1959 in the U.S. District Court for the Northern District of Georgia. Judge Frank Hooper was assigned to the case and was to remain with it until his retirement in 1971 at the age of 75.

Subsequent to the trial, the Court enjoined the School Board from operating segregated schools and ordered the Board to submit a plan to accomplish desegregation. The Court assumed that any plan submitted by the defendants would "contemplate a gradual process, which would contemplate a careful screening of each applicant to determine his or her fitness to enter the school to which application is made." (U.S.Dis.Ct. 188 F.Supp 401, June 16, 1959)

In January, 1960, Judge Hooper approved as final the plan submitted by the Board calling for desegregation of one grade each year, starting with grade 12 in fall, 1960. Transfer was to be made by application. Hooper then granted a one-year delay to allow the State legislature to repeal its school closing laws, which forbade integrated schools from receiving State funds. The plan was ordered into effect in the fall of 1961 for grades 11 and 12, with one grade to be added each year.

On August 30, 1961 desegregation officially began in Atlanta, when nine black students entered four schools for the start of the school year. The nine students had been carefully selected by the administration through a screening process of academic and psychological tests. (The use of such tests was invalidated in 1963 by the Court of Appeals in Calhoun v. Latimer, 321 F 2d 302 (1973)). Desegregation took place in 1961 without violence, something of which the city was very proud and which served to perpetuate its reputation as a leader in race relations among southern cities. For the second school year that transfers were accepted, 44 of the 266 blacks who applied were admitted into 10 previously all-white schools.

In November, 1962 the NAACP requested an acceleration in the desegregation process, elimination of discrimination in teacher assignments, and an end to the use of academic tests as prerequisites for transfer. The Court denied the motion:

> ...The Plan heretofore approved by this Court, and now under attack, has been administered fairly and in good faith by defendent Atlanta Board of Education, the local authorities have given utmost cooperation in maintaining law and order, and the number of students being transferred each year from previously designated colored schools to previously designated white schools is increasing at an accelerated rate each year as the lower grades are reached. This Court feels that the public interest demands that the Plan now in operation be continued according to its terms and not be summarily displaced by the new Plan of Desegregation proposed by plaintiffs. (217 F Supp 614)

The court ruled also that teacher assignment problems should be deferred until further progress was made in desegregating students and that a standard academic test was acceptable since such a test was being given to all pupils, not just blacks.

Plaintiffs appealed this decision and the Court of Appeals for the Fifth Circuit upheld the lower court. Writing for the majority, Judge Griffen Bell said, "...there is no evidence that the Atlanta School Board has acted other than in the utmost good faith throughout this litigation." (321 F.2d 302) Plaintiffs then appealed to the Supreme Court for acceleration of desegregation. They were joined in their request by the U.S. Justice Department, which filed a brief with the Supreme Court requesting that desegregation be accelerated. In

May, 1964 the Supreme Court remanded the case to the District Court to test the plan in light of its recent declarations concerning the meaning of "deliberate speed" as the standard for judging desegregation plans (377 U.S. 263).

In April of 1965 the District Court ordered that desegregation be accelerated to include all grades in the "freedom-of-choice" plan by the start of the 1967-68 year. Shortly thereafter, the Board of Education voted to open all grades to blacks under "freedom-of-choice" by fall of 1965.

The litigation continued through 1969 with the NAACP filing a series of actions and Judge Hooper applying a series of decrees as they were handed down by the Fifth Circuit--the Jefferson Decree in 1967, (United States v. Jefferson County Board of Education, 380 F2d 385), the Green Decree in 1968 (Green v. County School Board, 391 US 430), and the Montgomery County Decree in 1969 (United States v. Montgomery County Board of Education, 395 U.S. 225). Most important among these was the unanimous Supreme Court decision in Green in May, 1968 that if "freedom of choice" plans do not achieve effective desegregation, other plans must be formulated to eliminate segregation "root and branch."

These high court decisions prompted other legal action in Georgia. In 1968 separate lawsuits were filed against two county school systems in the Atlanta metropolitan area. The following year the U.S. Department of Justice filed a blanket suit for the desegregation of 81 school systems in the State of Georgia.

Events in Atlanta began to pick up in 1970, probably in response to the Supreme Court's October 1969 ruling in Alexander v. Holmes County Board of Education, a Mississippi case, that the "all-deliberate-speed" standard established in 1954 "is no longer constitutionally permissible" and that complete desegregation must be implemented "at once." Judge Hooper ruled early in the year that the school system had to transfer 1600 teachers, 800 black and 800 white, in mid-year to comply with the Fifth Circuit Singleton decision calling for the faculty of each school to reflect the composition of the system as a whole. The administration devised a lottery and, using a computer, reassigned the teachers to achieve a 57/43 black/white faculty ratio in every school. A year later the Atlanta Constitution described the transfer as a "violent wrenching of the school system that brought dissention, withdrawal of pupils and a resignation of teachers."[2] The school system recruited from 27 states and 126 colleges to fill the 846 vacancies created by teacher resignations, retirements, and leaves. One year after the transfer the majority of whites transferred were no longer with their new assignments--having either transferred again or left the school system. Parents became upset about the impact of the transfer on educational quality and discipline became a major problem in the schools.

Also early in 1970 Judge Hooper ordered the APSS to adopt the "majority-to-minority," or "M-M" plan, under which any student would be permitted to transfer from a school in which their race was in the majority to one in which their race is in the minority. The "M-M" plan was to remain the substance of the APSS's desegregation efforts through the final settlement of the APSS case in 1975.

Later in 1970 the APSS submitted a capacity-related zone attendance plan modeled after that of Orange County, Florida, and it was approved by Judge Hooper after seven weeks of trial at which other possible remedies were considered. The NAACP appealed the decision but the Fifth Circuit delayed action on the Atlanta case until the Supreme Court ruled on the busing issue posed by the pending case Swann v. Charlotte-Mecklenburg(402 US1.).The zone plan, devised by the five geographic area superintendents* and other top administrators, went into effect with the summer quarter, 1970.

In July, 1970, Judge Hooper, upon order of the Fifth Circuit, appointed a Biracial Committee to "make recommendations to the School Board concerning ways to operate and maintain a unitary school system." The Fifth Circuit had ordered a biracial committee organized in Jackson, Mississippi earlier that year. Judge Griffen Bell is usually credited with having originated the idea of the biracial committee. Lawyers from both sides suggested committee members, and Lyndon Wade, Executive Director of the Atlanta Urban League, was named director.

Said Judge Hooper when he appointed the Biracial Committee, "When people get in court, they fight. When they sit down around a table and keep cool, they'll make a settlement. That's a primary opportunity these committees have."[3] However, friction quickly developed between the Biracial Committee and the School Board. The Board had three black members out of ten at this time and apparently didn't feel the need for "biracial" advice. Said one member of the Biracial Committee: "I don't think the Board is inclined to make any use of us. I must admit I'm troubled by our posture, too. Some of the courts have been aggressive and specific as to the responsibilities assigned to the biracial committees. The Court hasn't assigned us anything."[4] Hooper responded that the Biracial Committee had not confronted definite issues because the Atlanta case had reached a plateau and probably could stay there until the appeal

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*A sixth area and area superintendent was added in 1972.

On April 20, 1971 the Supreme Court decided Swann. The Court ordered the use of any technique necessary to desegregate the schools and end any continuing effects of past discrimination. In particular, the Court said that busing was a legitimate tool for desegregating schools, so long as it did not jeopardize the health and education of students. In June, 1971, the Fifth Circuit Court of Appeals vacated the District Court ruling which accepted the APSS's zone plan and required a new student assignment plan to comply with the principles of the Swann decision. Thus a new phase in the Atlanta litigation began, dominated by the issue of school busing.

The Last Phase: 1971-1975

This period will be subject to more detailed review in later sections. Here a factual background is presented that will facilitate an understanding of subsequent discussions.

When the Supreme Court issued its Swann decision that promised to shape the desegregation debate in Atlanta in the coming years, the APSS was approaching the 70% black level. 47 out of 150 schools were desegregated, with only 32% of all students and 20% of black students attending desegregated schools.* 87% of black students attended schools that were 80-100% black; 33.6% attended all black schools.

Three days after the Swann decision, the superintendent of schools, John Letson, commented that "it is not possible for anything more to be imposed upon this city in the name of promoting integration without being self-defeating and having the exact opposite effect than what is intended. There can be no more desegregation in this city than we have already."[5] This statement reflected both the fear, shared by many, that Swann would mean mass busing in Atlanta and the fact that Letson was hardly a supporter of desegregation. Letson, who had been superintendent since 19 mounted substantial resistance to desegregation which led to public criticism of the Board for allowing him too much authority, to Letson's being excluded from negotiations in 1972 and 1973 between the APSS and the plaintiffs, and to charges that Letson was a racist. He left his post in 1973, three years before his contract expired.

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*"Desegregated" was defined in 1964 by Judge Hooper to mean having 10% or more of each race. This definition was never challenged in court.

In May of 1971, one month after the Swann edict, the Fifth Circuit court ordered the school district to submit a memorandum regarding the impact and relevance of the Swann decision, which sanctioned the use of busing, on the Atlanta desegregation plan. The School Board attorney, A.B. Latimer, former School Board chairman, wrote in the memorandum that Swann had virtually no effect on the Atlanta plan, which was "reasonable, feasible, workable."[6] This reflected the disposition of the 10 Board members that busing should not be applied in Atlanta. Even Board chairman Benjamin Mays, a well known black educator, opposed busing on the grounds that it would accelerate white flight.

The following month the Appeals Court vacated the 1970 order of Judge Hooper that had declared the APSS unitary and required the District Court to order a student assignment plan to comply with the principles of Swann. (443 F2d 1174) The higher court also ordered that the APSS provide free transportation to students participating in the majority-to-minority plan and that it submit semi-annual reports to the District Court. Since the APSS neither operated nor owned school buses, children in the M-M program were given bus tokens to use on the public buses.

The defendants' only modification of the plan in response to the Appeals Court order was to provide free transportation to M-M participants. They eschewed the use of mandatory busing. Plaintiffs objected to the failure on the part of APSS to use tools like busing, restructuring of grade levels, or pairing in "revising" the plan. Elizabeth Rindskopf, who had replaced her husband as attorney for the NAACP Legal Defense Fund after his death in an automobile accident, asked the Court to appoint an expert to draw a new plan for Atlanta. Joining Rindskopf as a new face in the litigation after Judge Hooper's retirement, Judge Sidney Smith declined: "Mrs. Rindskopf, I think that you, Mr. Latimer, and hopefully this court, has the degree of expertise needed in this case."[7]

The degree of expertise reigning in the litigation actually suffered somewhat in 1971 due to the change among chief personnel. In addition to Judge Smith taking over for Hooper, and Elizabeth Rindskopf replacing her husband as plaintiffs' counsel, a new School Board attorney was needed to replace Latimer, who also died suddenly. The Board hired Warren Fortson, a civil trial lawyer who came to Atlanta in 1965 at the age of 37 after his efforts to set up a biracial committee of city leaders to cool racial tensions in Americus,Georgia ruined his successful practice there.

In July, 1971, Judge Smith accepted the defendants' plan and ruled that the APSS was unitary. (332 F.Supp 804.) Smith, in so doing, adopted a tone of sadness and frustration that he was to maintain until he resigned from the bench, primarily because of his frustration with the Atlanta case. In his July order Smith praised the good faith actions of school personnel "throughout this uncertain decade," and referred to the changes within the school system as "convulsive implosions" and the "annual agony of Atlanta." After describing the extent to which resegregation had occurred, Smith exempted the school authorities from blame:

> The cause of such frustrating results lies in factors completely beyond the control of school authorities. Segregated housing, whether impelled by school changes or not, remains the unconquerable foe of the racial ideal of integrated public schools in the cities. The white flight to the suburbs and private schools continues....The problem is no longer how to achieve integration, but how to prevent resegregation.... Through it all, the Atlanta system has maintained a traditional position of leadership in the public schools (806).

In awarding a dismissal of cause the court states:

> Atlanta's de jure status has long since been removed by Board action and by successive court decrees. Its present problems are entirely de facto. There is absolutely no evidence of any affirmative action by the board to increase segregation....To the contrary, all official action for many years has been to promote integration. It appears to be a unitary system "within which no person is to be effectively excluded from any school because of race or color." On such basis, Atlanta is entitled to a dismissal (809).

Judge Smith then attempted to ground this ruling more firmly in Swann. He cites Swann as holding the essentials of any unitary system to be the elimination of invidious racial distinctions in regard to transportation, faculty and supporting personnel, extracurricular activities, construction and site slection, and the presence of an optional majority-to-minority transfer provision. "To the extent that they apply, Atlanta has had such essentials for some time(809)." Smith rejected busing as "neither 'reasonable, feasible, or workable'(808)." His principal objection to busing was that it would accelerate white flight and lead to an all-black system which, under the premise of Brown, would be injurious to remaining blacks. Smith concluded the order with a strong recommendation that a metropolitan remedy be studied. "Short of such critical reevaluation, the Atlanta system faces a difficult task in merely 'hanging on' to its present position, awaiting the uncertain reversal of white flight from its limits (810)."

Smith's unitary ruling was appealed by the NAACP on the grounds that there were 101 one-race schools in the system. The Appeals Court vacated the lower court finding and instructed the latter to give the NAACP a "reasonable opportunity to present an alternate and superior plan for the desegregation of the Atlanta School System." (451 F.2d. 583.) Superintendent

Letson was openly critical of the ruling: "The thing we desperately need is a period of stability and this decision does not give it to us."[8] Letson criticized the court for reopening the issue of forced busing and inviting more white flight.

The plaintiffs paid for an expert, Dr. Michael Stolee, to come to Atlanta and draw up a plan with the assistance of staff from the HEW Florida Desegregation Assistance Center. Stolee, Dean of the School of Education at the University of Miami, had considerable experience composing such plans and was concurrently devising a plan to desegregate the Minneapolis school system. Stolee was one of the two persons that Rindskopf had unsuccessfully attempted to have the court appoint as expert.

In January, 1972 Rindskopf presented the NAACP plan, developed by Stolee, to the district court. She claimed that it accomplished the "greatest possible degree of actual desegregation" by busing "the least possible number of students that we could get by with." The plan called for busing from 10 to 20 percent of the students (the actual number bused under the plan was a point of contention between parties). There would be both contiguous and non-contiguous pairing under the plan. A new feeder system would eliminate one-race high schools. Rindskopf asked for an injunction ordering the implementation of the Stolee plan.

After two days of hearings on the plan in May, the District Court rejected it and again held that the APSS was unitary. A two-judge panel, Smith and Judge Albert Henderson, the latter asked by Smith to help preside over the Atlanta case, conducted the hearings and signed the order. They wrote: "No one wants an all-black school system....And yet, the court remains firmly convinced that the busing plan offered will do just that in a very short time." (unpublished opinion of June 8, 1972) The court also ordered that faculty need not be reassigned annually to achieve a certain racial balance once it has been desegregated.

Following the pattern of the litigation, the Appeals Court vacated the unitary ruling four months later. The higher court ordered the School Board to draw a new student assignment plan within the following month for submission to the District Court for approval. It held that the fear of white flight could not be a factor in composing the plan. The Appeals Court directive established as a guideline that "at a minimum, this plan must utilize pairing or grouping of contiguous segregated schools, a technique never heretofore employed by this board." (Unpublished opinion No. 72-2453, 5th Cir., Oct. 6, 1972.) The court also directed the School Board to give special attention to the 20 schools that had white enrollments of greater tha- 90% and that had never been desegregated, that is, schools which never had black enrollments of more than 10%. The School Board voted 4-2 to appeal the Appeals Court order to the Supreme Court and to ask for a stay of further desegregation efforts, against the advice of its chairman Benjamin Mays and its new attorney, Warren Fortson, who felt an appeal would be a waste of time.

The appeal to the Supreme Court was never made and desegregation planning efforts were renewed. However, this time planning occurred on two quite different fronts. On one front, the assistant superintendent coordinated plan development according to guidelines issued by the Board. There was to be some pairing and a limited amount of busing, provided students were bused no more than one zone away from home. On the other front, a school board committee was beginning to negotiate with plaintiffs in an attempt to arrive at an out-of-court settlement. The idea of a negotiated settlement had come from Circuit Court Judge Griffen Bell, who had recently accepted an invitation by Atlanta business leaders to give an address on the desegregation situation in Atlanta. Bell, who would not be ruling on the case in the Fifth Circuit, chided the businessmen for not taking it upon themselves to end the lawsuit and urged them to negotiate out of court.[9] A pre-hearing conference was then held by the Court of Appeals, at which time the parties indicated that a possibility existed for a negotiated settlement. The Appeals Court order of October 6, 1972, which vacated the most recent unitary ruling by the District Court and established guidelines for the development of a new plan, was issued to authorize and guide settlement negotiations.

While negotiations were ongoing, in October, 1972, the School Board did not want to consider the staff-developed plan publicly. So the Board sent a progress report to the Appeals Court noting the continuing efforts to reach an out-of-court settlement. The Board delayed acting on the staff plan until the deadline for submission of a plan to court was near. The Board then rejected Letson's plan because it did not involve enough busing. The plan would have bused only 1000 students using eight buses. In rejecting this plan the Board was not demonstrating a commitment to busing; rather it was acting on the fear that an unacceptable plan would lead to a more severe court-imposed busing plan.

Participating in negotiations were three Board members (2 white, 1 black), local and national NAACP representatives, attorneys for both parties, and selected community leaders. Superintendent Letson was excluded from the sessions because NAACP attorneys felt that he would be unwilling to compromise. The sessions were called and conducted by Lyndon Wade, the Chairman of the Biracial Committee. Eleventh hour negotiations failed and the plan was sent to the Board without NAACP blessing. The Board adopted the plan, which affected 38 schools, transferred about 2850 students, and bused 1400.

There was time for one more maneuver before the deadline set by the Appeals Court. In verification of a rumored split between the national and local NAACP, the School Board began holding secret meetings with the local representatives. The local faction, led by Lonnie King, president of the Atlanta NAACP, was more willing to compromise on the issue of busing while the national group favored widespread busing as proposed in its Stolee plan. In order to fortify the local position, Lonnie King hired another lawyer, a young, novice black lawyer named Benjamin Spaulding. King obtained for both himself and Spaulding the power of attorney for the plaintiffs by obtaining the support of 8 of the named plaintiffs who were willing to express dissatisfaction with the representation provided by the Legal Defense Fund attorneys--Rindskopf and her superiors.

Negotiations between the School Board and the local NAACP faction produced a compromise plan to close four schools, transfer 4300 students, and appoint a black superintendent. The plan was approved by the Board by a 6-2 margin. Voting against the plan were the two members who were strictly opposed to any further desegregation of the schools. The Board submitted the plan to the Appeals Court without the endorsement of the other 19 named plaintiffs. Thus began the conflict over class representation that was to plague the court for the remainder of the litigation.

On November 24, 1972, the Appeals Court rejected the settlement proposal and again vacated the earlier unitary ruling. The Court held that "class representation complications negated this Court's acceptance of that proposal" and that "further appellate proceedings at this juncture are deemed inappropriate." (469 F.2d 1067, at 1068) The Court sent the case back to the District Court to give the parties a second chance for a negotiated settlement.

The second phase of negotiations began with plaintiffs submitting a plan to the School Board which would then have 30 days in which to agree, compromise, or develop a new plan. The plaintiffs' plan, drafted by Spaulding and Rindskopf (representatives of both the local and national NAACP) contained three parts--student assignment, faculty, and administration. It included busing, contiguous pairing, the creation of middle schools, reassignment of faculty to comply with Singleton, and the designation of a majority of administrative posts to be held by blacks. Twenty-two new administrative positions would be created. This plan was a compromise between the national and local NAACP positions. The School Board and administration reacted very unfavorably to the plan. Superintendent Letson objected that "to shift or change the racial composition of administrative staff by the employment of unneeded personnel is a ridiculous proposal, and under no circumstances should it be approved."[10] This comment led one board member on the negotiating committee and the chairman of the Biracial Committee to call for an end to "inflammatory statements" in the interest of negotiation.[11]

The School Board adopted as its starting point for negotiations a plan that a member described as "minimal."[12] The plan involved no forced busing. Some schools would be closed and several middle schools would be created. Six of the all-white schools that the Appeals Court had ordered be given special attention were untouched by the plan.

Just over a month after the plaintiffs' plan was released a compromise was reached. The Board made concessions on faculty and administration issues in return for concessions on pupil assignments. The plan, involving a limited amount of busing, faculty assignments to accomplish racial composition in each school within a wide range of the systemwide composition, and the transition to a black-controlled administration, will be discussed fully in a later section. The School Board approved the plan by a vote of 8-1.

When the compromise plan was ready for submission to the court, Rindskopf refused to sign it, explaining later that "I didn't think I needed to. Spaulding has the power to sign for everyone....I do not intend to object to it (in court)."[13] Shortly afterwards it became known that she had been instructed not to sign it by her authorities at the Legal Defense Fund. Chief among them was Howard Moore, Rindskopf's law partner in Atlanta who earned a reputation as attorney for Angela Davis. Stung by what it felt to be unfavorable publicity, the national NAACP repudiated the compromise and ordered the local branch to withdraw its support for the plan.

The national press interpreted the settlement as a major shift in NAACP policy. The New York Times wrote: "The NAACP, in a major departure, consented this week to a school desegregation plan for Atlanta's public schools that accepts a minimum of integrated classrooms in exchange for a maximum of integrated administrative positions."[14] The Washington Post called the settlement a "major break with past policy" and predicted that the new policy would lead to considerable defusing of the busing issue." NAACP leaders feared that its efforts in other cities would be impaired if it supported the compromise plan in Atlanta.

Contrary to Rindskopf's claim, Legal Defense Fund attorneys, including Rindskopf, did oppose the compromise in court. Said Jack Greenberg, Executive Director of the LDF, "We have informed the judges that we are going to oppose the settlement...because we feel that it's in violation of the Constitution, and contrary to the interests of the class."[15] This pronouncement was made one day before a hearing on the plan was to be held. The split in the representation of the plaintiff class presented what Judge Smith termed "some difficult legal questions." Smith considered polling the plaintiff class to determine the level of support for the plan, but instead opened the hearing to comments from parents concerning the plan. He deferred decision on the plan until the end of the month (March, 1973) and planned a hearing at that time when members of the plaintiff class could speak to the court about the plan. The plan was posted in various locations throughout the city for parents to view.

After the hearing the Court approved the compromise plan as fair and reasonable, and as having satisfied a majority of the class. (362 F Supp 1249) Four appeals issued from this decision--from the Legal Defense Fund, the national NAACP, CORE, and ACLU--the latter two having unsuccessfully sought to intervene on behalf of certain plaintiffs who opposed the settlement. The national NAACP ordered the Executive Committee of the local NAACP to repudiate the settlement. When the Committee refused its members were suspended.

Four months later the Appeals Court vacated the lower decision. (487 F.2d 680) The Appeals Court ruled that the District Court erred by not holding evidentiary hearings on the plan and by not permitting would-be intervenors to present evidence in support of their intervention. Lacking a fully developed record, the Appeals Court felt unable to rule on the merits of the cause and remanded it to the lower court to pursue on other than a negotiated basis:

> Since the prior appeal of this case it has become obvious that the pursuit of an agreed settlement of this class action has failed. As the district court poignantly observed, the moments of truth for this case seem to have slipped away. We are not satisfied they are irretrievable. It would serve no worthwhile purpose to pursue the various reasons why or to attempt to fix particular fault upon any of the parties or the court below for the collapse of efforts to conclude this protracted and progressively perplexing case on an agreed basis under Rule 23(e). Suffice it to say that after months of intense and sincere effort by many elements of this community, the product of such labors continues to provoke widespread and genuine controversy. In this state of affairs no plan can be approved as a valid composition of the difference being litigated. (487 F.2d 680)

Because the 1973-74 school year was to begin in one week, the Appeals Court allowed the plan to stand for one year but ordered the District Court to hear evidence in order to decide whether to adopt the plan as the permanent solution by the following spring.

Following hearings in May, 1974 the District Court approved the compromise plan as final and for the fourth time in four years declared the APSS to be unitary. (Unpublished opinion of May 1, 1974) Since the court had allowed intervention on behalf of two separate plaintiff groups, the plan was approved despite the objections of three groups of attorneys and plaintiffs.

On October 23, 1975, the Appeals Court, seemingly more out of exhaustion than legal necessity, affirmed the lower court decision.

> Since 1958 when this school desegregation suit was filed, the winds of legal effort have driven wave after wave of judicial rhetoric against the patrons of the Atlanta public school system. Today hindsight highlights the resulting erosion, revealing that every judicial design for achieving racial desegregation in this system has failed. A totally segregated system which contained 115,000 pupils in 1958 has mutated to a substantially segregated system serving only 80,000 students today. A system with a 70% white pupil majority when the litigation began has now become a district in which more than 85% of the students are black. Notwithstanding the lack of success in integrating these classrooms, our task is to test whether the plan approved for district operation realistically promises effective protection now for the right of the pupils to a nondiscriminatory education....
>
> The aim of the Fourteenth Amendment guarantee of equal protection on which this litigation is based is to assure that state supported educational opportunity is afforded without regard to race; it is not to achieve racial integration in public schools....Conditions in most school districts have frequently caused courts to treat these aims as identical. In Atlanta, where white students now comprise a small minority and black citizens can control school policy, administration and staffing, they no longer are. (522 F.2d 717 at 718-19)

Thus the 18-year litigation was brought to an end. While everyone breathed a sign of relief that the "annual agony of Atlanta" was over, almost no one was satisfied with the outcome. Those who had fought for integration were left with a substantially segregated system and those who sought black control were in control of a system suffering from 18 years of inattention to educational quality. Those who had tried to protect the business interests in the city were left with questions as to the ultimate economic effect of the episode, and those who tried to assert the "we can" spirit of Atlanta above the meddlings of the court were left to wonder about their freedom to manage the affairs of the city.

Desegregation under court order may not be over for the APSS. The metro case, Armour v. Nix (Civil Action 16,708 N.D.Ga.) is still pending. The separate metropolitan action was first brought in 1971 at the suggestion of the District Court. Plaintiffs in the case, represented by an ACLU attorney, seek to desegregate the APSS along with eight county systems in the surrounding area without actually consolidating the systems. The District Court stayed the case pending the Supreme Court's decision in the Richmond case, which came in Spring, 1973 and affirmed the appeals Court overruling of the District Court's cross-district desegregation plan. Armour v. Nix is now being heard by a three-judge District Court panel.

Since some members of the School Board favor metropolitan desegregation, School Board attorney Fortson was put in a difficult position. As a result Fortson has largely withdrawn from defending the Board against the suit and the assistant Attorney General for the state has taken over as counsel for defendents. The thrust of the plaintiffs case is housing discrimination. They argue that a policy of containment by the state has kept blacks in Atlanta. The case in defense is that residential patterns would likely be the same in the absence of such containment, to the extent that there was containment.[16]

ACLU attorney Hames sought and was denied intervention on behalf of her clients in the city desegregation case. In order to assure Hames that the outcome of the city suit would not prejudice her clients' case the court ruled that "all matters pertaining to the metropolitan school systems have been severed from this proceeding and are reserved for further resolution in Armour."

Summary of Events

The following is a summary of events since 1970:

February 1970. Judge Hooper orders rezoning and transfer of teachers.

July 1970. District Court orders creation of Biracial Committee. (Unpublished)

June 1971. Appeals Court vacates order and requires a student assignment plan to comply with Swann. (443 F.2d 1174)

July 1971. District Court (Smith and Henderson) rejects a busing remedy and finds the system unitary. (332 F Supp 804)

October 1971. Appeals Court vacates and orders the District Court to grant plaintiffs a reasonable opportunity to present an alternative plan. (451 F.2d 583)

June 8, 1972. District Court (Smith and Henderson) rejects the Stolee busing plan, because it would accelerate white flight, and again declares the system unitary. (unpublished)

October 6, 1972. Appeals Court vacates and orders School Board to submit a new plan for student desegregation to the District Court. (unpublished opinion, No. 72-2453, 5th Cir., Oct. 6, 1972)

November 1972. Appeals Court rejects the first compromise plan and sends the case back to the District Court to resolve questions of class representation. (469 F.2d 1067)

April 1973. District Court (Smith and Henderson) approves the second compromise plan as final remedy and finds the system unitary. (362 F Supp 1249)

August 1973. Appeals Court accepts the plan for one year but vacates the unitary court and remands the case to the District Court for evidentiary hearings. (487 F.2d 680)

May 1, 1974. District Court (Henderson) approves the compromise as the final decree and declares the system to be unitary. (unpublished)

October 1975. Appeals Court affirms the District Court order. (522 F.2d 717)

December 1975. Appeals Court denies request for rehearing. (525 F.2d 1203)

III. Remedy-framing in Light of Swann: 1971-1972

Judge Sidney Smith

The period immediately after the Supreme Court's Swann decision coincides with the transition from Judge Hooper to Judge Smith. Hooper was 75 years old and, according to Smith, was probably kept on the case too long.[1] Smith was assigned to the case with the understanding that two other judges in the district would help him. He was displeased with the assignment and would not have undertaken it alone. One of the judges was disqualified because he had helped represent the School Board back in the early stage of the lawsuit. That left Judge Henderson to help. Smith served as chief judge until he resigned from the bench in 1974, after which Henderson saw the litigation to its conclusion.

Smith attended Harvard and then got his law degree from the University of Georgia. He was a partner in a general practice law firm from 1951-1962. Elected Superior Court judge in 1962, Smith served until his appointment to the U.S. District Court in 1965, at the age of 41. He was named Chief Judge in 1968 and served until he resigned in 1974 at the age of 50 to join a private law firm in Atlanta.

Smith was not new to public school issues. From 1959-62 he was chairman of the school board in his home town in Gainsville, Georgia, a small town 40 miles from Atlanta. The Gainsville board had two blacks then, which was quite unusual for the times. In a judicial capacity he was involved in the blanket lawsuit launched in 1969 by the U.S. Justice Department against 81 Georgia school districts. It was in that case that the district established the precedent of a panel of judges because, as

Smith put it, "misery loves company." According to Smith these 81 districts were the "hard core", "redneck" ones that had refused to desegregate earlier, when HEW desegregated many Georgia districts. Even so, desegregation was not difficult to achieve because the districts were small--often with just one white high school and one black one. The common remedy was to make one a junior high and reassign the students. There was thus only a limited amount of that experience that could be applied to Atlanta.

The enormity of the 81-district case necessitated a concern for streamlining court procedures, which Smith brought with him to the Atlanta case. There was no way for the court to litigate each district's situation separately so the judges devised a formula that would determine whether a system was integrated and then let each school system decide how to reach that point. The Judges conducted informal meetings on school premises with school district administrators and attorneys from both parties to see what kinds of difficulties were being encountered. There were only six appeals out of the 81 districts.

Prior to his involvement in the Atlanta schools case, Judge Smith had been involved in many Title VII cases. Atlanta, in his words, was the original battleground for those cases since it was the outpost of many organizations--NAACP, ACLU, SCLC, SNCC--that specialized in legal representation of minorities.

Smith feels that the courts are really out of their element in school desegregation cases, being called upon to rule on issues in which they lack expertise. He expressed this feeling clearly in a hearing when an attorney for the plaintiffs asked the court to pay attention to teacher quality:

> ...everybody is trying to use the court to run the jails, run the hospitals, run the factories, run the schools, and we can't do that. There is no practical way that we can do it. We are bad administrators by nature, all judges are bad administrators, and this is putting the worst kind of personality and the worst kind of expertise where you ought to have good administrators and this is one of our problems.
>
> We are doing things that courts aren't designed to do and we have great fear of these broad orders just being chewed up one hearing at a time for the next, I don't know, we haven't calculated till we can retire, but however long that is.[2]

He cites defaults by the legislative and executive branches as the reason for court involvement. The courts were relied upon because they were not political bodies. But the adversary system, in which people "are supposed to come and throw things at each other," does not lend itself to the desegregation setting, in Smith's judgment.

Judge Smith also feels strongly that the Supreme Court has gone astray in desegregation law. He believes that the Court should have established the doctrine that equal protection means equal opportunity and quality education. The Court's focus instead on numbers and people-moving is wrong, in his opinion.

Presiding over the Atlanta case was a very frustrating experience for Smith. He seemed particularly troubled by the lack of legal clarity of the issues on which he had to rule, something which characterizes school desegregation cases generally but which was aggravated in Atlanta by the preponderance of parties and attorneys and the length of the litigation. Also troublesome for Smith was his inability to get a factual basis for his judgments and the tendency for issues to reappear after he thought they had been resolved.

Reflecting his belief that courts are ill-equipped to adjudicate desegregation cases, Smith tried to encourage the parties to work things out outside of the courtroom, even before actual negotiations began. Smith and Henderson urged the attorneys to resolve the smaller problems on their own.[3] During the compromise phase of the litigation, Smith put much store in the fact of agreement between parties, and somewhat less in the content of that agreement. In this approach he embodied the "mediator" judge who sees his role as facilitating agreement between the parties.

His interest in mediation was probably responsible for his being "absolutely crushed" by the Appeals Court order rejecting the compromise plan in August, 1973. It was shortly afterwards that he resigned from the bench and he admits that the Atlanta schools case was primary cause of his resignation. In addition to finding the experience frustrating he felt it was a major failure on the part of the court. However, Judge Smith maintained that if he had it to do over again there is nothing he would do differently. He feels there is nothing that could be done differently.

Smith believes that the major cause of the failure was the lack of a goal for the courts. Neither the Appeals Court nor the District Court knew what was supposed to be done. The state of the law was very unclear and continually evolving. The courts would settle one question only to find out soon afterwards that it wasn't enough anymore. With no clear goals to guide them the courts failed and the people settled the case.

Smith resigned from the bench also out of dissatisfaction with the court system as a whole. He felt the system was overcrowded and the judges overworked. He blamed the understaffing on the Watergate-era reluctance by Congress to give Nixon the power to make judicial appointments. He admits that his sense of overworking was due also to his taking his job too seriously. Smith never took a vacation for three years "under the misimpression that they couldn't live without me." As Chief Judge he had a lot of administrative duties that he did not enjoy. He left the bench to act as a senior advisor within a new and young firm. In his words, they needed some grey hair to go along with all the young lawyers. Hardly an old man himself at 54, Smith is very happy in his new position.

The District Court Order of July, 1971

It will be recalled that in July, 1971 Judge Smith rejected a busing remedy for Atlanta and declared the APSS unitary. 332 F.Supp 808. The legal basis for this decision was Swann:

> Swann holds that once de jure status is removed that a school district is not required to reintegrate continually due to de facto changes. "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimation through official action is eliminated from the system. Swann Part VI," (808.)

Smith held that the existing segregation was de facto because it was due to factors totally outside the control of the APSS--white flight and housing discrimination. In addition, he found no evidence of affirmative action on the part of the School Board to increase segregation, while considerable effort had gone toward promoting integration.

Smith also based his holding on the fact that the school district had formed task forces to study the possible use of pairing and rezoning but had rejected these remedies.

> All of those efforts have been reviewed by the court and representatives of the plaintiffs. Pairing or additional zone changes along the line either produce substantial hardship increases in travel time for the children involved or seriously imperil existing integration at one of the schools

> involved. In either event, the end result at best would accomplish only a temporary change soon to be wiped out in the historical patten already established, (807.)

The only remedy which would effect any significant change, according to the court, was mass busing, but that was rejected for three reasons. First, the time and distance invdved would be "impractical". This was an acceptable reason, under Swann, for rejecting a busing remedy, as the court noted. Second, the court was convinced that busing would accelerate white flight and leave an all-black system which, according the premise of Brown, would disadvantage the remaining students. Third, the Atlanta community, both black and white elements, opposed busing. The court placed great store in the fact that the School Board, with three black members, including Dr. Benjamin Mays, deemed it unrealistic to desegregate further and that the Biracial Committee, chaired by a black, furnished the court with a resolution praising the Board's efforts and recommending no further action. This demonstrates Smith's tendency to base legal judgments at least partially on community opinion and interest.

The July, 1971 order was a strong rejection of busing. It is not surprising that the court was not well disposed toward the Stolee plan, which called for a considerable amount of busing to implement the pairing proposals contained in the plan. The Stolee plan, it will be recalled, was the plaintiffs' response to the Appeals Court order that the July, 1971 order be vacated and that plaintiffs be afforded an opportnity to present their own plan.

The Stolee Plan of Plaintiffs

The Stolee plan proposed to use boundary changes, zoning, contiguous pairing, and non-contiguous pairing to desegregate the schools.[4] It sought to eliminate all one-race schools and assign pupils so that each schools would more or less reflect the racial makeup of the system. Schools would have between 54% and 87% black enrollment. The plan attempted to equalize the burden of transferring between black and white pupils.

At the elementary level the plan had three parts. The first part included 12 schools where existing attendance lines were unchanged because the racial percentages within those schools fell within the general range of the system's racial percentages. The second part proposed to desegregate 47 schools by combining adjoining or contiguous zones and changing the grade structure at schools within the newly enlarged area. Typically, one predominantly white and one or more predominantly black schools would be combined in a group. Only a portion of pupils in this part of the plan would need transportation. The third part used similar grouping and pairing techniques with schools that were not contiguous. It included 64 schools which were to be combined into 22 groups. Transportation would be needed for most students covered by this part of the plan.

Middle schools and junior high schools would be desegregated by boundary changes without disturbing the grade structure. Ten high schools would be desegregated by redrawing attendance zones. The remaining 14 would be desegregated by establishing non-contiguous attendance areas from which students would be transported to the high schools. Stolee estimated that about one-fourth of all students would be bused under the plan. The School Board estimated that closer to one-half would be bused. The differing estimates were the result of varying assumptions and troubled the court considerably during the hearings on the plan.

The staff desegregation component of the plan was minimal. It provided that vacancies be filled by use of "reasonable, nondiscriminatory and reviewable standards and procedures," that written qualifications and evaluations be employed, and that records be maintained for at least three years. The plan established a presumption that blacks in each professional classification should reflect the percentage of black teachers in the system and provided for an affirmative recruiting effort and for dismissals, demotions, and promotions to be made on a nondiscriminatory basis.

In preparing his plan, Stolee drove to all schools, clocking the travel time between them. There was general resentment toward him on the part of the school system. They considered him an outsider who constructed a plan with virtually no knowledge of the local situation. The assistant superintendent, who spearheaded the defendants' planning effort called Stolee's plan "a windshield analysis" in reference to the fact that he "knew" the system only from within his car.[5] Stolee was subject to intense questioning, particularly by Judge Smith, in the hearing on the plan in May, 1972.

Hearings: May 3-4, 1972

Throughout the hearings Judge Smith acted more like an opposing lawyer cross-examining witnesses than like a judge. Particularly on the first day of hearings, when Stolee was a witness, Smith spoke far more than either of the lead attorneys. He questioned witnesses sharply, paying close attention to detail and often putting them in uncomfortable positions by disclosing weaknesses in their testimony. Smith interrupted to ask questions constantly, in spite of his concern for expediting the proceedings. At the end of the first day he said he would try not to talk so much next time, but the following day saw him back in the posture of cross-examiner.

The May 3 6 hearing began with Smith expressing some impatience at the parties' inability to agree out of court on the issue of faculty desegregation. He had delayed the hearing at the insistence of counsel, who claimed they were on the verge of an agreement. Warren Fortson, attorney for the School Board states that an agreement was not reached.

COURT: Well, I am trying to find out what my job is, that's all, and in March you all told me that you were practically 95% agreement at that time and if I would put that case off one more time that by the time we got here today that issue would be gone.

FORTSON: That is on the administration, Your Honor?

NABRIT:* There is no agreement, Your Honor, that is the answer. That's where we stand.

FORTSON: On the question of the administration, Your Honor, we have gone forward with the plan that was presented at the meeting and we have incorporated that, whether they agree with it or not, at this point I can't say, sir.

COURT: Have you agreed on anything except to put this case off for all these months?

FORTSON: The only thing we have been successful on agreeing on is the Exhibits.

COURT: Well, the Court is at fault then for waiting if nothing was happening; but I was led to believe by all Counsel that considerable progress was being made and please put the case off for another month and I would do it.

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*James Nabrit from the NAACP Legal Defense Fund in Washington, D.C. was lead counsel for plaintiffs at the hearing. Rindskopf was also present.

FORTSON: Your Honor, from our standpoint, considerable progress was made, it was made insofar as the second issue in the integration of the administration was concerned. The Board feels that considerable progress was made, we met with the Bi-racial Committee and the NAACP, and we came up with what we thought was considerable progress coming out of those meetings. Whether or not the Plaintiffs' Counsel--

COURT: What issue is left about staff?

FORTSON: Maybe Plaintiffs' Counsel could tell me what they are not pleased with and what they want the Court to do.

NABRIT: I can speak in general, I think.

COURT: I want you to speak specifically if you want me to rule, this is like some great big bowl of jello, I have to find out what I have to rule on.

NABRIT: May it please the Court, I think that our request we filed in our motion in December, that the type of provisions recommended in Dr. Stolee's plan on this subject are what we are seeking (in) relief.

COURT: What is it that he has in his plan that you don't now have from the city, I'll put it that way. It's not my job to go in here and search these things out, it's the job of the litigant to tell me what he wants and what is wrong with what (he) has and that's all I'm asking.

Later, after Stolee had described parts of his plan, Smith objects to the plan as inattentive to the patterns of neighborhood in Atlanta.[7]

COURT: Well, you see, the problem in Atlanta has been if you put in a plan like this then the next year the whole situation is changed.

STOLEE: Yes, Your Honor. I would not propose that these zones be ordered for time into eternity.

COURT: Well, I know you all would like to come back every year and have use redesegregate what is resegregated.

STOLEE: I suspect the school system could make proper adjustments as enrollments require, school systems all over the country have been doing this for years on the basis of changes of residence.

COURT: Atlanta has been too for about ten years, this is the point.

The following exchange between Stolee and Smith on the issue of white flight shows Smith in his cross-examiner role:[8]

COURT: Do you think the situation in Washington where it is 98% black is good or bad educationally?

STOLEE: I believe it is below, considerably below best education.

COURT: Well, if that were to happen to Atlanta I assume your answer would be the same for it.

STOLEE: As far as expanding beyond the city--

COURT: No, if it turned all black.

STOLEE: Oh, I don't know that it is going to turn all black.

COURT: Well, I don't know that it's going to stay like you plan, this is my problem. You have an excellent plan--

STOLEE: Thank you.

COURT: --but what assurance do I have that it will last from September 30th to the next school year? This has been the problem for thirteen years with this case and everything the courts have tried have simply ended up in destruction with racial balance. That is the problem.

STOLEE: In one of the Exhibits, Your Honor, that presently will be discussed shortly, it can be shown that this trend occurred before any significance, the trend began before any significant desegregation of the schools occurred, and they might be totally unrelated.

COURT: Perhaps if this had been done in 1961 it might have prevented it, but it wasn't done. Now, whose fault that was I don't know, it may be the Court's; but nobody knew what you were supposed to do in '61 and I am not sure we do in '71. But the fact is there, so you needn't say it shouldn't have happened. It has. Now what assurance do I have that this will stop it, that is the problem before the Court.

When Stolee gets to the details of the busing component, Smith pays close attention and doesn't let anything by unquestioned. One thing that particularly troubles the judge is that Stolee, in calculating the number of students needing busing, uses a standard of 1½ miles but counts only those students whose school assignment would be affected by the plan. Smith objected that it would be a denial of equal protection to provide free transportation to some but not all students residing more than 1½ miles from school. He also objected on the grounds that it would not be politic to run a school system that way. The point of his objection is that if all students similarly situated were to bused, Stolee's estimates were very low.[9]

COURT: Well, again I suppose it is what we were talking about before lunch, that if you bus one you have to bus all....

STOLEE: That's a legal question, Your Honor.

COURT: That's a factual question.

STOLEE: What I want to point out that it is not because of the desegregation plan, because of other considerations that might be--

COURT: I don't see how you can run a school that way and I think you agree with that.

STOLEE: I have seen the majority/minority transfer where they provide busing to some and not to others. I am not aware of the rules on that, Your Honor.

COURT: Well, I am talking about as a schoolman, not as a lawyer. There would be hell to pay with the patrons is what I am saying.

NABRIT: Well, we were discussing this, and it occurred that there might be ways of drawing the distinction that would be fair and racial, so we ought not--

COURT: If I was a working mother and they were carrying somebody else that worked at the place I did to school and I lived just as far it wouldn't be racial to me, that's all I am saying.

On the subject of busing, and the numbers who would require it and its cost, Smith becomes very frustrated at not being able to get believable information. Stolee, as mentioned, underestimated the number that would need busing, and the defendants, in their analysis of the plan, used a standard for the computation that inflated the number.[10]

COURT: The reason I am asking these questions, I understand they are going to tell me that 55,000 students are to be bused, you tell me that 23,000 are; and as in most cases it is somewhere in between that the truth is, and that is the figure I am not going to get from either one of you, I can tell that right now.

COURT: How many pupils do they transport in that county?

STOLEE: Duvall County, 35,120.

NABRIT: What year was that?

STOLEE: That was for the 1970-71 school year.

COURT: Well that number of buses doesn't gee-haw exactly with yours, does it?

STOLEE: Excuse me, sir?

COURT: For 23,000 pupils you say Atlanta would have to have 100 buses; for 35,000 they have 250.

STOLEE: I am looking for the average number of trips. Duvall County, they are getting average of 2.8 one-way trips.

COURT: Which is right on the money for your average.

STOLEE: Yes, sir, just about.

COURT: So, obviously your figure of 100 buses is low if Atlanta is anything comparable to Duvall.

STOLEE: Yes, the figures, as you say, they don't gee-haw.

COURT: No. And the true figure in Atlanta is not 23,000 but probably closer to 35,000, that's what is so frustrating about these things and courts aren't set up, I'm not a busman. I can't be an expert on the cost of buses and every other thing under the sun, and how am I going to find out the truth?

Earlier, on the subject of school capacity, Smith had expressed a similar frustration at not having the knowledge on the basis of which to rule: [11]

COURT: In other words, the question is not bodies in a room but teachers per body, is that right? Okay, that's all I want to know. Judge Bell has said we're all going to have a leave of absence to go to Harvard Business School to run these factories and everything before we can continue. We may have to have a Graduate School of Education at Miami, maybe.

STOLEE: I will be happy to have you.

COURT: If I have to go it would suit me to go to Miami--in the winter quarter.

When the subject turns to the capital costs of buses and amortization Smith really feels at a loss, although through it all he is very astute--always asking the right questions and exposing the weaknesses in Stolee's arguments. Reflecting on his Harvard Business School comment he says at this point: "Now I have to go to school and become a C.P.A." [12]

Smith discovered other ways in which Stolee had made his plan look better than it was. For example Stolee had based his calculations on having buses that were always full to capacity and that traveled only from point to point, never stopping at pick-up points along the way. Under more realistic conditions the number of buses would be greater and the trips longer. [13]

COURT: It would take more time and more buses, isn't that right, Dr. Stolee....It is obvious to me because he takes the number of pupils and divides them by seventy-eight and runs them 2.8 turns and it is full all the time. Well the buses don't run that way.

RINDSKOPF: I'm afraid I--Your Honor, when you use averages, when you make estimates, you have to use this--

COURT: He makes no discount for that in his calculation.

COURT: I am not being overly critical, but I would not make a finding of fact that you could move pupils in his plan in 100 buses....And this witness' figures are all minimum, that is the least time you could go from one school to another--that is loaded, ready to go, start the timer, go to the place, stop the timer.

Smith's other pet peave, in addition to the cloudiness of the legal issues involved and the inability to adjudicate on a factual basis, is the use of "experts" to "prove" what common sense would tell in far less time. In one particular situation Nabrit, counsel for the plaintiffs, was trying to show that segregated schools cause segregated housing patterns, which in turn cause segregated schools. He said he would have experts testify to that effect.[14]

COURT: That's what bothers me is that the school decisions do affect the neighborhood and they have affected the neighborhoods in Atlanta, that's what bothers the Court.

NABRIT: But the type of affect I'm talking about is dual school systems help segregate housing and this is an example and we are going to have testimony to that effect from experts on the subject.

COURT: You needn't offer any expert, I know that if there is an all-black school and an all-white school here you are more likely to have whites in the white attendance zone and blacks in the black even if you changed them overnight. That's common sense. You don't have to prove that by anybody, that's one of the problems; but I don't know one thing the School Board can do about that in terms of making people stay where they live.

NABRIT: Integrate the schools, Judge, this is the kind--

COURT: Well, the correlary to your statement is that if you have a 70% black school here the 30% are liable to move out. They shouldn't, but they do. Again that is common sense and you don't have to have an expert to prove it.

NABRIT: It seems to me that common sense can be helpful but it also can be misleading.

COURT: Well, you want to use it for one proposition and discard it for the other, and it doesn't take a judge or lawyer to prove both statements, yours and mine.

Smith's impatience with experts surfaced the following day when plaintiffs called their second principal expert, Dr. Karl Taeuber, Chairman of the Department of Sociology at the University of Wisconsin. Taeuber's specialty is population studies with particular attention to black population and the patterns of migration. Plaintiffs called upon Taeuber to demonstrate that school desegregation was not a cause of white flight, and that white flight would occur with or without desegregation. His testimony was intended to nullify Smith's major objection to the plan--that it would accelerate white flight. Taeuber, in his academic research, had developed a segregation index by which the degree of housing segregation in a city could be captured by a single number from 0-100. He had recently applied the index to school segregation as well. Smith listened carefully as Taeuber explained how the index was constructed and asked Taeuber questions until he was sure he understood. Then he suddenly became impatient, wondering about the relevance of the testimony.[15]

COURT: Let me interrupt a minute, in the interest of time. If this witness is here to show that Atlanta is crowded with blacks and that most large cities in the country are, I accept that.

FORTSON: If Your Honor please, if I could carry that one still further, if he is here to show that under Dr. Stolee's plan by moving these pupils around we would have a good looking index figure as opposed to a worse one than we have now, I will stipulate that and we can dispense with the rest of the testimony.

COURT: Well, again, I ask counsel what does this have to do with our case?

NABRIT: Well, I will try to move along.

COURT: Before you move along, tell me what is relevant about it?

NABRIT: I'm trying to build up to establish the basis for him to talk about that subject.

COURT: Just ask him now because that's the only relevance I can see to all this.

COURT: All of these are admitted, there is no question about it.

Atlanta is black, Atlanta is segregated and so is every other major city in the United States. I don't know what to do about it and apparently the witness won't until he finishes his next project.

Finally Smith gets the witness to state the point of his testimony as it relates to the case: [16]

TAEUBER: The point is simply that the rate at which the whites are coming into the city does not seem to be related to the degree of desegregation achieved as of 1967.

COURT: In other words, if Atlanta is going all black, whatever the Court does won't have anything to do with it, is you conclusion?

TAEUBER: That is the essence of testimony....

The same thing happened all over again with the plaintiffs' next expert witness, Martin Sloane, an attorney and Assistant Staff Director of the U.S. Commission on Civil Rights. His specialty was housing discrimination and he was brought by plaintiffs to testify that public and private action has contributed to housing segregation. Judge Smith says that if this is the purpose of the testimony then he will simply accept it and the witness need not testify. School Board attorney Fortson again says he is willing to stipulate that past government discriminatory actions has contributed to racial segregation and that furthermore, if Nabrit would tell him what plaintiffs intend to show with the remaining witnesses that chances are he will stipulate that as well because "I don't think it has anything to do with the central issue in this case."[17]

Smith then asked Nabrit to state in his place what he expected to prove by the present witness. Nabrit hesitated and said there were a number of facts, to which Smith replied: "Well, state them, every lawyer ought to be able to do that....Don't describe them, name the facts, Counselor. This is very simple, it's done in every case I have ever tried, could have been done during the four months you all have been fiddling around." Nabrit protests that the disadvantage of such a procedure is that he cannot speak on the issues as well as his witnesses could. Smith retorted:[18]

> I know, but we don't just call in a bunch of experts and explore around. You are supposed to put him up for a particular purpose and I'm not required to let you parade one hundred witnesses in here if they are not relevant to the issue.

Plaintiffs called only three more witnesses for very short testimony. Following that, Fortson called two witnesses, both from the APSS, to testify against the Stolee plan. They objected to Stolee's estimates of the number of students requiring busing and thus of the cost of the plan. They also argued that the plan would be counterproductive, by encouraging whites to leave the school system.

The District Court Order of June 8, 1972

Needless to say, the plaintiffs' experts did not change the court's mind about the efficacy and desirability of a busing plan for Atlanta. This unpublished order of the court shows a remarkable ability to use testimony from the hearings in all its detail to support the court's contention. In particular, the court stood the expert testimony of Taeuber and Sloane on its head and used it to justify a rejection of the Stolee plan.

The order begins with a detailed account of the cost of the plan, complete with calculations and an estimate of the tax levy that would be required to implement the plan. As in 1971, the court's prime objection to the plan is that it would foster white flight.

> The Stolee plan is "workable in the sense that it can be put into operation by the reassignment of the pupils involved and the expenditure of the sums indicated. It is "feasible" in the sense that it apparently is a sound approach to the problem of redistributing both Black and white pupils on an equal basis so as to create a more nearly perfect racial mix. There is no question that Atlanta would "score well" on September 1, 1972, if it is adopted. The concern of the Court is September 1, 1973, if such course is taken. Thus, it is the "reasonableness" of the plan and whether it is constitutionally required or desirable that troubles the Court. (10)

The court cleverly uses the plaintiffs' expert testimony to show both points--that the plan is neither constitutionally required nor desirable. Without citing Sloane's testimony on housing discrimination, the Court claims that the Stolee plan is not constitutionally required because existing segregation is de facto--a result of private and public actions to promote housing segregation in Atlanta and its suburbs and the consequent population shifts and resegregation. The court addresses the question of desirability in Taeuber's own terms, using his school segregation indexes for various cities to demonstrate the following points:

--that Atlanta's scores on both housing and school segregation are not much different than the average, or even the best, city;

--that the school index has improved much more in the last decade than the housing index;

--that the better the school index in a city, the smaller the black enrollment. Atlanta's school score is better than the majority of cities with black school enrollment over 50%; and

--that the cities with the best school scores, i.e. the most integration have experienced a marked increase in black population, e.e. white flight.

Thus the court rejects Taeuber's view that school orders have no impact on white flight and claims that "Substantial integration, even though imperfect, is preferable to an all-Black system or none at all (15)."

The court then addresses the question of when a system must be considered unitary. Only if "each and every school-house must be separately desegregated at least one time before a system is legally unitary" would a plan such as Stolee's be required, regardless of its consequences. "However, where a substantial good faith local effort has been made and the system has been declared unitary through successive court orders, at some point the process should end....This is inherent in the language of Swann (15-16)."

The court concludes:

> It serves no purpose to reiterate the findings of the July 28, 1971, order. Because Atlanta has long since been a "genuinely non-discriminatory" unitary system; because it has been a "de facto" city since at least 1967; because its imperfection is due to causes beyond the control of the Board; because no "state-action" is involved any longer; and because Atlanta will most likely evolve into an all-black system if the plaintiffs' plan for busing is adopted, it is again rejected (16).

IV. Remedy-framing under Rule 23(e)--the Settlement Approach

The First Attempt at Settlement

It was in October, 1972 that Circuit Court Judge Griffin Bell urged Atlanta businessmen to try to settle the case out of court. Afterwards, business leaders approached their two representatives on the School Board and asked them to get something going. Not knowing quite how to begin, the board members set up a meeting with Lyndon Wade, the Biracial Committee chairman, Lonnie King, president of the Atlanta NAACP, and Jesse Hill, a leading black spokesman and Chamber of Commerce president.[1] The two board members next sought designation as a School Board negotiating committee. Board chairmen Benjamin Mays was much in favor of beginning negotiations. Since the Board committee structure was informal, the negotiating committee met as an informal, ad-hoc committee. Other board members wanted to participate and were allowed to, despite the fact that some of the more conservative members were opposed to compromise and were thus a detriment to negotiation proceedings.

The Court asked Lyndon Wade to mediate in the negotiations, which at first involved only local NAACP officials. Throughout the negotiations Wade encouraged the parties to get together, called the meetings and presided over them. The Biracial Committee held no meetings with the Court, but Wade kept Judges Smith and Henderson informed about the progress of negotiations. A court order was obtained to permit the meetings to be conducted privately. Prior to the order, some members of the Board had refused to meet privately because School Board meetings, by law, were public meetings.

After a short time negotiations began to include attorneys from both sides--Warren Fortson for the School Board and Elizabeth Rindskopf and James Nabrit for the plaintiffs. Rindskopf was from a local firm that reprsented the NAACP Legal Defense Fund; Nabrit was from the Fund's Washington office. Margie Hames, an attorney who was representing the same plaintiff class in the "metro" suit that had been filed in 1972, was excluded from the negotiations because it was felt she would be unwilling to negotiate on many of the issues involved.[2] Also excluded was Superintendent Letson, viewed by many as an arch conservative.[3] Letson did not favor the negotiations because he wanted to persist in the attempt to get the system declared unitary. According to one board member, Letson threw roadblocks in the way of their meetings any way that he could.[4]

The talks quickly centered on three issues: students, teachers, and administration. At this time 106 of the system's 153 schools were segregated, meaning they had more than 90% of one race. 81 of those 106 had never been desegregated. (The others had either resegregated or had been built since 1967 under court supervision.) 58% of the white pupils and only 19% of black pupils attended desegregated schools.[5] Although the student body was nearly 80% black, the teaching faculty was about 50% black and the administrative staff only 20% black. In addition, most black teachers were assigned to the identifiably black schools. The parties began negotiations on these issues without an indication from the court as to what would consitute an acceptable outcome. In fact for the district court, the fact per se of a compromised agreement would be a major step toward acceptance. The parties realized at the time that the District Court would be likely to approve whatever settlement were to result, although they were far less certain of obtaining Circuit Court approval.[6]

There soon emerged a split between the local and national NAACP over busing. The national group favored extensive busing such as the Stolee Plan proposed. The local group, eager to end the lengthy lawsuit and not willing to believe that transporting black children 10 miles from a 90% black school to a 75% black school was sensible, was not committed to large-scale busing. Black community opposition to busing, which blacks knew meant busing black children, also shaped the local faction's attitude toward busing.

As mentioned in section II, Lonnie King hired his own lawayer, Spaulding, to assure that the local view would be represented, and the two of them began to meet with the School Board to the exclusion of LDF attorneys. Spaulding, a young black lawyer who had idolized Howard Moore and other LDF attorneys, soon found himself in the strange position of opposing their views.[7] Spaulding said he took the job as King's lawyer because of his beliefs that busing can be destructive and that physical integration is not always necessary to acccomplish educational objectives. He had worked briefly for CORE, which later submitted a plan for Atlanta's schools opposing busing and favoring community-controlled neighborhood schools. Spaulding entered the litigation with the additional belief that the school administration was insensitive to the real issues of educating children and that some changes were needed at the top.[8]

Spaulding filed a motion to have himself substituted as plaintiffs' counsel, after obtaining signatures from some of the named plaintiffs. A panel of judges approved adding, rather than substituting, Spaulding as counsel. Two days later Spaulding appeared at the Circuit Court in New Orleans to support the plan that the local NAACP faction and the School Board committee had agreed on and which the Board had approved by a 6-2 vote. The plan involved some school closings, majority-to-minority transfers, and the appointment of a black superintendent. Fortson, the School Board attorney, recalled that the defendants had entered into negotiations knowing that the appointment of a black superintendent would be one of the terms of the agreement. According to Fortson, Letson was "recalcitrant" and could not bring himself to do what had to be done. Every desegregation proposal would be called "educationally unsound" by Letson. A movement had started to replace Letson with a black even before negotiations began.[9]

The Fifth Circuit refused to adopt the plan because of "class representation complications" and sent the case back for a second attempt at settlement.(469 F.2d 1067) It ordered that the lower court "hold such hearings as may be required to enable the Court to determine the present status of the class or classes in this litigation and the status of legal representation thereof under Fed.R.Civ.P. 23(d) and ordered the APSS to submit a new plan covering student assignments and faculty desegregation. The court ordered that particular attention be given to teacher desegregation in light of defendant's admission that the original order to comply with Singleton had never been fully implemented.

Pursuant to the remand the District Court conducted a one-day hearing in December, 1972. First the issue of class was resolved:[10]

JUDGE SMITH: The Fifth Circuit directed that we hold such hearings as may be required to enable the Court to determine the present status of the class.

I do not understand what that means--do you? You have had a lot of private conferences with the Fifth Circuit, could you enlighten us on what that means?

FORTSON: If Your Honor please, sometime while we were trying to meet the Court's mandate for the 27th deadline, there arose a dispute between the members of the plaintiff as to who was representing whom.

JUDGE SMITH: That's not what that says, that is the next clause.

FORTSON: Yes, sir, I understand that; but in the hearing at the Fifth Circuit a question arose out of that as to which one of the two legal counsel were representing the class and the other counsel represent another portion of the class.

JUDGE SMITH: Well, isn't the class the parents of all black children in the Atlanta School District?

FORTSON: The class, I think, would be all the black children in the Atlanta School System.

JUDGE SMITH: Well, either way it is not 27 people, or 9 people or 15 people, it is 50,000.

FORTSON: Yes, sir, and of course, my reason for raising is that it is irrelevant to us who represents who, so we have nothing further to say about it. With that I would simply defer to the counsel here for the plaintiff and let them thrash that out, sir.

JUDGE SMITH: Well the Court's question related to the phrase "to determine the present status of the class or classes." There isn't but one class, is there? Isn't it either the black children or parents of black children in the Atlanta public schools?

FORTON: That's my understanding.

JUDGE SMITH: That's all of them. Well, does everybody agree that is who the class is?

FORTSON: Yes, sir, we do.

JUDGE SMITH: All right.

MR. MOORE: We do certainly agree. The plaintiffs certainly agree that is what the class is.

Next, they grapple with the issue of class representation. Howard Moore, LDF attorney, states that the conflict has been resolved. Spaulding's motion to be substituted as counsel has been withdrawn and replaced with a motion to have him added. The attorneys are in agreement that Moore, Rindskopf, and Spaulding are all three representing the plaintiffs. Judge Smith asks if there is anyone in attendance from the plaintiff class that objects to representation by those three attorneys. Margie Hames, who represents the plaintiffs in the metro suit, speaks up to protect her interests in that suit. An interesting discussion ensues about the roles of lawyers vis a vis plaintiffs:[11]

MOORE: Which plaintiffs do you represent?

HAMES: The twenty-six parents, black parents.

MOORE: We filed a notice of adding counsel, and we would like the record to indicate that Mrs. Margie Hames is not our counsel, nor does she represent any of the name plaintiffs or members of the class in the presently existing lawsuit.

SMITH: Well, if they are black parents of any child in the Atlanta public schools, aren't they members of the plaintiff class? This is what is bothering me.

MOORE: Not necessarily.

SMITH: No?

MOORE: Not for the purposes of the litigation, because they only have standing in this particular case if representation of existing plaintiffs is not adequate; and there has been no demonstration at any time that representation of the existing plaintiffs in this case is not adequate or that the existing plaintiffs cannot adequately represent the interests of the class.

SMITH: Well, I assume what Mrs. Hames' fear is that they will be bound by the suit, and she doesn't want to be, want her clients bound--she may or may not. Of course, in this district the way the class action is worked, if they win, everybody claims they are in it; if they lose, they claim they are not. This is the way it has run so far.

MOORE: Actually the plaintiffs that Mrs. Hames represents have no interest that would be precluded by this particular lawsuit, because this lawsuit is a suit to end racism in our public school system; and no other lawsuit that doesn't have concomitent purpose--

JUDGE SMITH: This is true, but it is a question of who has the right to control it. These school suits, I suppose welfare suits too, Judge Henderson and I were discussing it, are the only cases really run by the lawyers and not by the class.

MOORE: I differ to that.

JUDGE HENDERSON: Most envious position in the world. I don't know of another lawyer in the whole country that can control litigation like can be controlled in this case. I am not saying that no organization or no group of people cannot furnish legal representation for individual plaintiffs or for a class of plaintiffs; but I think we would all have to recognize, to be perfectly honest, that his has always been litigation controlled by the lawyers and not by the class itself. I strongly suspect that is one of the reasons this dispute came up in the Fifth Circuit.

MOORE: That is not so....

MOORE: ...the named plaintiffs are members of the class that participated in the formulation of the approach to this case at virtually every step. Control with respect to a case and control with respect to counsel is a matter of practicality,that counsel of necessity has to make those decisions which he as a lawyer is forced to make; wherein the particular litigants may make those suggestions or approaches to the case that they feel would bring them the relief they seek.

In terms of practicality, division of it has been ideal, there has never been any antagonism between members of the class in this case, because there has never been any black people in this city who said they wanted a racially integrated (sic) school system.

JUDGE SMITH: Well, of course, I am confident in the earlier years it was different, but since we have been in the case, we haven't seen a member of the class.

MOORE: Well, that happens a lot of time, shareholders suit, members of the class don't necessarily come in.

JUDGE SMITH: They haven't been in the courtroom, they haven't testified as witnesses or anything. I wouldn't know a member of the class if I saw him.

Having resolved who the class is and which attorneys will represent the plaintiffs, Smith turns to the issue of settlement. It seems to be his view that a settlement between parties would eliminate the need for a trial on the merits. He orders the parties to compile a list of one-race schools and schools out of compliance with the Singleton faculty order because those would be the focus of the court in the event that there were no settlement:[12]

> ...we would hope that you all can make your peace; but if you can't, we want to know what we have to do factually in order to come up with a final order in the case. As I see it, absent an agreement, we would be zeroing in on these two groups of schools...

Moore then raises the additional point that the court should concern itself not only with the racial distribution of the faculty but with quality as well, to insure that the best black teachers aren't put in the white schools. That causes Smith to state what he sees to be the limits to court involvement in remedy-framing: [13]

JUDGE SMITH: Well, of course, I think in retrospect that this is what the emphasis should have been on all the time in school litigation. They should have been talking about equal protection the sense of equal quality, equal opportunity, equal good schools; this is what the courts should have been doing instead of fretting around with all this other stuff.

MOORE: But that was the law since 1896, I mean, it was never complied with.

JUDGE SMITH: Well, that's what should have been being done in these past ten years instead of all these things we have been doing. I think legally there would be a firm basis for it, to say we are going to require, i.e., the courts are going to require absolute equality when it comes to quality education, then throw your freedom of choice on there and we would have had something working--but the horse is out of the barn.

MOORE: You might not have had Brown against the Board of Education.

JUDGE SMITH: Yes, but so far as I know I don't know any authority that would require us to say that teacher number 4,062 is not equal to teacher number 2,023, and therefore, she cannot be assigned to school number 102. I just don't see how we can do that.

(Moore argues that the Court should take quality of teachers into consideration when judging whether there is discrimination in teacher assignment practices.)

JUDGE HENDERSON: How do you propose we resolve that, Mr. Moore? How do we do it, go one by one?

MOORE: Well, I think the mechanics of it isn't as important as the principle, and as I stand here now, I am not sure--

JUDGE SMITH: We understand the principle and I agree with you one hundred percent, and I am ready now to tell them not to do it; but I am not willing to come back here day after day and decide whether one of these 5,000 teachers is better than another one by way of enforcement.

JUDGE SMITH: ...I want to make it clear we can't by the remedy of contempt tie up judicial manpower for the rest of this century on little bitty questions, and I am unwilling to do so.

At the end of this hearing, the stage was set for the next round of negotiations--and the next round of confusion surrounding class representation.

The Compromise Plan

The process of negotiating began with the plaintiffs' counsel submitting a plan to the Board. This plan was itself a compromise between the local and national factions of the NAACP. It proposed to integrate all of the all-white schools and reduce the number of all-black schools from 86 to 59. 52% of all pupils would attend integrated schools under the plan. This was much milder than the Stolee plan, which would have integrated all schools. Integration would be achieved, under this new plan, by pairing 56 elementary schools and creating 7 middle schools. 18,000 students would be bused, according the plan. The faculty portion of the plan was a strict adherence to Singleton, where each school's teaching staff would reflect the system-wide racial distribution. The plan would create 22 new administrative positions in order for the administration to become majority black without the loss of white positions.

When the plan was disclosed, Lonnie King was charged with giving in to middle class Blacks in southwest Atlanta who did not want their children bused by leaving those schools out of the plan and putting the burden of desegregation on the poorer, inner-city blacks.[14] When King presented the plan to the Board his plan was criticized from the opposite angle as involving too much student desegregation. This was only the beginning of the awkward positions in which King was to find himself as he sought to represent the black Atlanta community.

The School Board formed a new negotiating committee with five of its ten members. Mays was not on it, but the committee was headed by another black. Mays ordered the administration to prepare its own plan in case negotiations broke down. The committee approved a plan as its starting point in negotiations. Although a court order had called for special attention to be given to the 20 schools that had always been more than 90% white, the Board's plan left 6 of the 20 untouched, a reflection of the power of some board members with constituencies from those northside neighborhoods. The plan involved no forced busing, only some rezoning and the creation of new middle schools. Moore objected to the Board's plan as illegal,[15] since it involved no busing past neighborhood schools.

It was clear that the Board, in negotiations, would be willing to give up some administrative posts to blacks, but would not agree to a massive movement of either teachers or students.[16] The NAACP would require, at minimum, some two-way busing in order to get the approval of the LDF attorneys. Negotiations were complicated by the fact that both sides were divided among themselves. The division among plaintiffs has been discussed. On the defendents' side there were several power centers on the board--one representing the business community, one opposing any additional desegregation, and one of blacks favoring desegregation without mass busing and with black administrative control.

Negotiating sessions were conducted privately in the Trust Company of Georgia building downtown. The press was excluded because it had been taking a "crisis" approach to the issue which the parties deemed detrimental to negotiations. But there were instances of press leaks which caused the parties to be supicious of one another. Tempers flared frequently in the sessions and heated arguments occurred over school closings.[17]

The parties reached an agreement in mid-February. There was little dispute over the administrative component of the plan. This was probably because, as one school official reflected, the system was bound to have become black in a year or two anyway.[18] The upcoming School Board election would have brought in a majority-black Board, which could have appointed blacks to top level administrative positions. So the whites gave up only a year or two of control. Also, no one lost his position since the transition to black control was accomplished through filling vacant positions and creating new ones.

Faculty and student desegregation involved major compromises, the Board giving in on the faculty in return for concessions on pupils. The resulting provision for teacher desegregation was that a "Singleton-plus-or-minus-10%" requirement would be imposed. The racial composition of the faculty in each school would have to be within 10% of the system-wide composition. Rindskopf had held out for a provision this strict and she wrote the faculty portion of the plan.[19]

For student desegregation the plan adopted the goal of getting 30% black enrollment in each of the 20 all-white schools. The following criteria were adopted:[20]

1) no school would contain fewer than 30% Black students.
2) no exceptions would be made unless a school was shown to be stable and integrated(20% or more Black).
3) White students would be transferred only into schools where the resulting enrollment would be 30% White.
4) All black schools unaffected or left "untouched" would be determined according to agreed upon objective criteria such as condition of the building, classroom space, distance to other schools, and phasing out.

Desegregation of schools was to be accomplished with the following tools in the listed priority:

1) redrawing of zone lines
2) school closings
3) pairing with the closest school of the opposite race.

By far the most important aspect of the student desegregation plan was the majority-to-minority plan. This was to be used to attract black students to the white schools before any of the other tools were applied. In fact, as implemented, there were only two instances of pairing. Instead, a major effort at expanding the M-M program was undertaken. The longest section of the student portion of the written plan is an overblown discussion of the M-M program telling of the operation of the program, its administration, and the community involvement that would be sought. There was to be a considerable "Madison Avenue" drive to attract participants in order to reach established quotas at the white schools and obviate the need for other kinds of desegregation. The plan proposed to bus 2,761 students out of about 90,000 using 31 buses.

The School Board approved the compromise plan by a 8-1 vote. Howard Moore, who had not participated in the negotiations, decried the plan:[21]

> The agreement is wrong for Atlanta....If it is approved by the Court, it will abort the transition of the Atlanta school system from a dual to a unitary one. The hopes and dreams of Black people for equal education and equal educational opportunities will have been betrayed.

Moore stopped short of saying he would oppose the plan in court.

A hearing on the plan was set for March 8, 1973. The day before the hearing the national NAACP announced that it would oppose the agreement in court. The directive to oppose the settlement came from the Board of the National NAACP and from its Director Roy Wilkins. Said Wilkins, "The Atlanta case is a violation of the national policy of the NAACP on school desegregation. It does not appear to satisfy any of the criteria."[22] Lonnie King of the Atlanta branch claimed that Wilkins supported the plan at first and King blamed the LDF attorneys for Wilkins' change of heart. The LDF denied that charge and says it was the other NAACP branches that put pressure on Wilkins. Said Wilkins' assistant, "Judges were asking questions, opposing counsel were asking questions, and we had to make it perfectly plain that there is no change in our position on desegregation in the public schools." [23]

The plan had the support of the Southeastern branch of the NAACP, however, whose director, Ruby Hurley had been with the organization longer than anyone except Wilkins. Said Hurley, "for the life of me, I do not see how this plan is in violation of NAACP policy. Maybe this ends my career with the NAACP."[24]

The hearing was held despite the opposition from LDF attorneys but a ruling on the plan was postponed. At the hearing Smith tries to understand why Rindskopf withdrew her support after participating in the settlement proceedings and he has little patience with Moore's response:[25]

MOORE: I want to make it very clear that to the extent that Mrs. Rindskopf represented that no other counsel objected to the plan, that that statement was unauthorized.

JUDGE SMITH: Well, of course, you know there is all sorts of law that the Court can only deal with lawyers. You have about seventy-five thousand clients in this case.

MOORE: We understand that.

JUDGE SMITH: And I can't find out from each of those seventy-five thousand clients if you have authority each time you speak with this Court. Under our legal system you are an officer of the Court, and the Court is free to deal with you and rely on your statement.

MOORE: We want the record to be clear that was unauthorized representation.

JUDGE SMITH: Who did not authorize it?

MOORE: I did not authorize it, myself.

JUDGE SMITH: Well, are you a member of the plaintiff class?

MOORE: I am a member, I was a member of the plaintiff class.

JUDGE SMITH: But you are no longer?

MOORE: Well, I think that is irrelevant.

JUDGE SMITH: Well, you don't have the authority to withdraw authority from her.

MOORE: I think I do.

JUDGE SMITH: Why?

MOORE: I want to say one other thing, that we had not seen the final draft of the proposal.

JUDGE SMITH: At the time she made this statemnt, I know she had seen a final draft of it because we looked at it together.

MOORE: But we had not seen it.

JUDGE SMITH: Well, I can't help it if you don't tend to your business and look at it.

Moore then says that an evidentiary hearing on the plan is required under law, but Smith responds that he is not aware of any such requirement. Rather than holding a hearing, Smith says he may resort to polling the class to determine their views on the plan. Two weeks after the hearing Smith issued an order denying plaintiffs' motion for an evidentiary hearing. The order stated that "no additional evidence is desired or needed for such purposes", that facts "have been thoroughly tried on numerous occasions" and that "another trial on the same facts is burdensome and unnecessary."[26]

The issue of intervention also arose at the March 8 hearing. Both ACLU (Hames from the metro suit) and CORE had earlier been denied intervention. Smith later admitted that the denial had been on grounds of expediency.[27]

CORE's motion for intervention had come in February, the day after the compromise was reached. The motion was denied without hearing on two grounds, both of which are challenged by CORE in the hearing. First, a representative from CORE, Conley, offers as support for his motion a Supreme Court case, NAACP v. Alabama, where the Court held that the NAACP had standing to represent its members.[28]

SMITH: Excuse me, but in that case that was the beginning of the case, wasn't it?

CONLEY: Yes, sir.

SMITH: Well, the whole point is here that you cannot possibly have any standing without some client, and every client that you could have that would have standing is already in Court before CORE gets here.

CONLEY: The second point made by the point was that there was adequate representation of counsel and that we should have stated during the latter part of December that we wished to become a party to the action.

SMITH: More importantly, fourteen or fifteen years ago.

CONLEY:...We had no reason to realize, no reason whatsoever to realize or take the position that our clients were not properly protected until we had a preview of the plan which was being submitted to the Court. The plan as construed clearly did not represent the interests of our client and clearly violates the Fourteenth Amendment.

It was on that ground that we sought to intervene because we felt that additional representation of counsel was clearly needed.

Our other point was that in order--

SMITH: I might say one thing this case doesn't need is a few more lawyers.

Smith denies intervention but allows Conley to state his objections to the plan and says that if CORE submits a plan it will be considered as an amicus.

Another issue that emerges in this hearing is the matter in which the class must be notified of an impending settlement. Hames states that the court must make it clear to members of the class that they have the right to voice their objections to the court. Smith says he is not sure that Rule 23(e) affords class members a legal right to object in court. But Smith is much concerned with the views of the class and opens the floor to members of the class to hear their objections.

Later the court arranges for the plan to be viewed at 11 locations around the city and sets a hearing for Mach 29 to hear from class members on whether the plan is "fair, reasonable, and adequate". At that hearing, before the floor is opened to the class, Smith is faced with another motion for intervention, this time by the national NAACP, as separate from the LDF. Nathaniel Jones, of the NAACP requests that they be permitted to intervene and give evidence against the plan. The court is again faced with the strange request for intervention on behalf of plaintiffs that are already class members and Smith handles it much the same as he did with CORE's motion:[29]

JUDGE SMITH: ...We have a proposed settlement before the Court. We are now considering that settlement. If the Court rejects the settlement, then we will have evidentiary hearings on possible alternatives, unless the Court draws its own plan. We have fifteen years of evidence in the case.

JONES: Well, that may be so, Your Honor, but with respect to the plan before the Court now, the proposed intervenors are recommending that the plan does not conform to the minimum standards of the decided cases, nor does it comply with the order of the Fifth Circuit, and their rights are being abridged thereby and they are seeking this opportunity to come before this Court and to develop discovery which can be presented to the Court at a subsequent time to indicate and to support their position.

JUDGE SMITH: Well, I think we understand your position, and your point is in the record. We will consider what you have filed as objections to the proposed plan.

As stated, if the proposed plan is rejected, and if the Court does not draw its own plan based on all the evidence we have and we consider an alternate plan, we will have a hearing on possible alternate plans.

JONES: I still have a problem, because I am not sure that I am adequately protecting the rights.

JUDGE SMITH: We are not going to let the N.A.A.C.P. in as a party in the case at this stage.

JONES: I understand that.

JUDGE SMITH: On the same basis, we have not let all these other groups in as parties.

JONES: But I am talking about the individual intervenors now (as opposed to NAACP as a group).

JUDGE SMITH: They are already in the case. They don't have to intervene, they are already in the case. Now, there are about 75,000 plaintiffs in the case, and we cannot have separate lawyers for every one of them. This is obvious.

JONES: But with respect to the plan itself, we maintain there is no one in the case representing their constitutional rights and their interests.

JUDGE SMITH: Well, I assume their objections to it are stated in the papers you filed with the Court and will be considered by the Court.

When the floor was opened to the class, Smith finally saw the class members that he had complained earlier he had never seen. The spectacle served to underscore his observation that lawyers, not plaintiffs, run school desegregation cases. Plaintiffs seemed sadly out of place in their own courtroom. Many spoke of irrelevant issues, not knowing the boundaries of the litigation. An unofficial count showed 9 of the 33 speakers endorsing the plan, 5 opposing it without posing alternatives, 6 supporting CORE's neighborhood school plan, and 4 endorsing the metro solution, which was not an issue in the case.[30] Reflected Smith at the end of the hearing:

> ...a small portion of these remarks were properly addressed to the Court and another portion to the Board of Education. I am afraid most of the relevant matters that will solve this thing ultimately, the things of the mind and the heart and the spirit are addressed probably to a higher authority than either.

The District Court ruled that the conflicts over class representation did not invalidate the agreement:

> The court has carefully reviewed the plan and it appears that the plan was freely evolved by the parties, together with the Biracial Committee previously appointed by the Court, and that the plan is consented to by an attorney of record for each of the parties for its adoption by the court....
>
> Where the record reveals that counsel in fact (as here) negotiated and agreed on a compromise prior to trial, federal courts have held under a great variety of circumstances that a settlement agreement once entered into cannot be repudiated by either party and will be summarily enforced by the court.... The court views such eleventh hour maneuvering as inconsequential and without legal effect. (362 F. Supp 1249-50.)

In accepting the plan, the court took into consideration the views of the class as expressed at the hearing, in mail to the court, and in a petition circulated in support of the plan containing several thousand signatures, and concluded that the "plan, at least, appears to the court to satisfy the overwhelming majority of the plaintiff class." (1252.)

In keeping with the court strategy to have as much as possible decided out of court, the court directs that

> all disagreements between the parties over implementation of the plan, if any, be first presented to the Biracial Committee, or a subcommittee designated for such purpose, during said three-year period at a quarterly or special meeting for such purpose. No issue will be considered by the court until such procedure is followed and the Biracial Committee certifies to the court that it is unable to resolve the dispute. (362 F. Supp 1252.)

This later becomes the subject of dispute in the appeal, where plaintiffs claimed that the court was giving the Biracial Committee a quasi-judicial role that was inappropriate. Henderson's response to the charge reflects the shared frustration of Judges Smith and Henderson:

> I do not conceive of the biracial committee being able to exercise the function of the court, as well as I would like to have some other group exercise it. I can't shirk that responsibility, and I think the intent that Judge Smith and I placed on it, the purpose in using the bi-racial committee as has been suggested by the Fifth Circuit Court of Appeals in the other cases, was that it could aid the court a great deal in resolving small or isolated problems.[32]

The Atlanta community was generally very supportive of the compromise. Business interests wanted an end to the turmoil that threatened the economic climate. Parents wanted some stability to the school situation. Black leaders had been supporting King's efforts for some time, reflecting the new attitude that blacks don't need whites in order to achieve quality in education. Two editorials in the Atlanta Constitution from the period between the compromise agreement and the District Court's approval demonstrate the attitude that the agreement was right for Atlanta:

Atlanta NAACP leadership has come under fire from the national NAACP for agreeing to a compromise school desegregation plan, one that would hopefully after more than a decade finally get this city's schools out of court.

That compromise plan has strong support from both white and black community leaders here. Black leaders demonstrated courage and conviction in working out an agreement which they knew in advance would produce criticism.

Atlanta is fortunate in having the kind of leadership, white and black, that does worry very much about exactly what happens to this community. Black leaders here, in working out the school plan, accepted as one premise the idea that it was important to keep white pupils in the Atlanta school system, that it was to nobody's advantage if the school system became all black. We think that is an important consideration, a valid one.

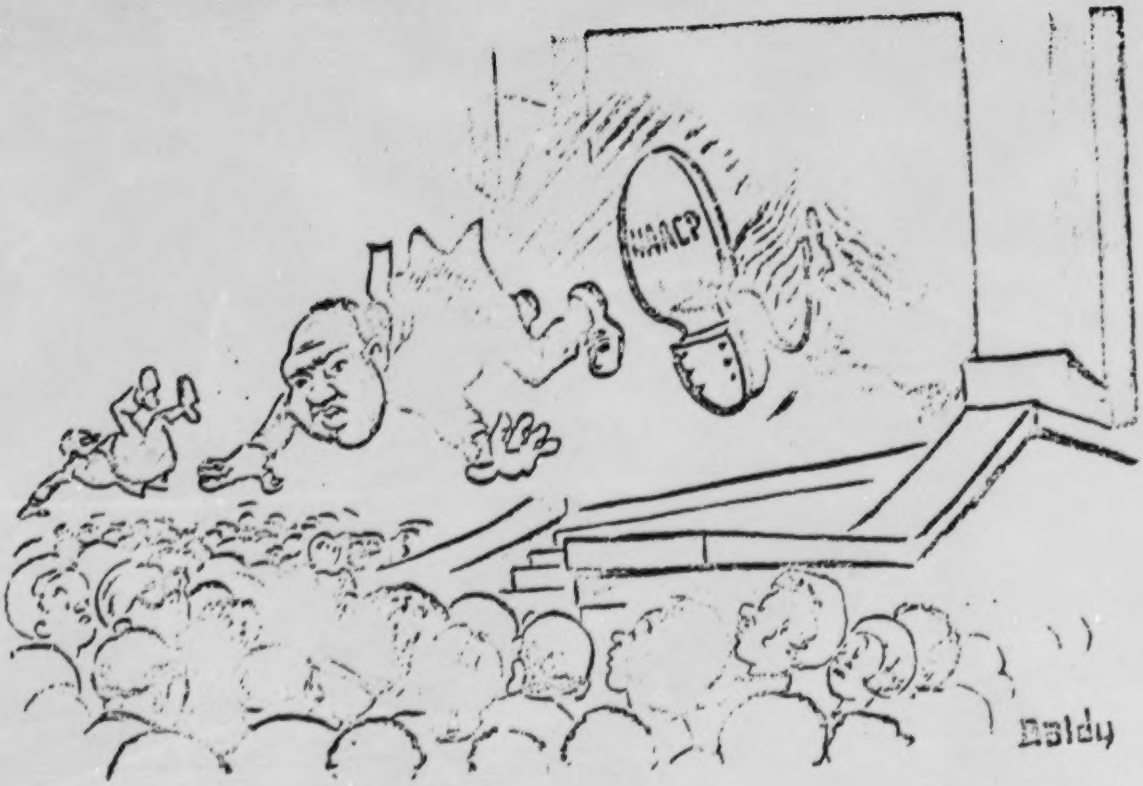
Atlanta and Southeastern NAACP leaders are under fire right now because they had the courage to sit down with school board members and try to work out a school desegregation plan acceptable to both white and black communities. They deserve support from Atlanta citizens, even as the new school plan deserves support.

March 7, 1973

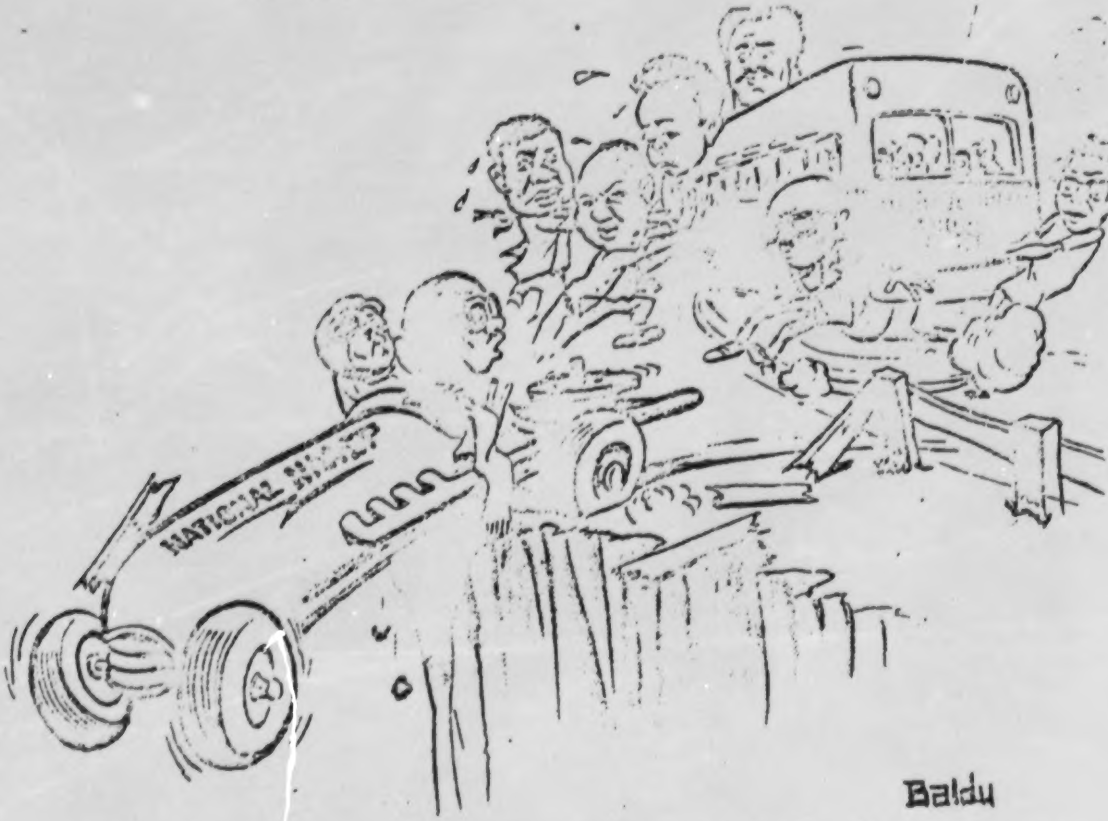
We question both the wisdom and the good will of such opposition. It seems to us the New York officials have demonstrated far more interest in keeping the case in court than in working out any agreement that would be to the best interests of the school children involved and of the Atlanta community.

March 9, 1973

These editorials were accompanied by the following cartoons:


NAACP
Baldy

'. . . All You Think About Is School Kids!'


NATIONAL
Baldy

'. . . Aren't You Coming With Us? . . .'

Later, while the appeal was pending, a columnist in the Atlanta paper offered the following strong support of Lonnie King:

> Lonnie King, Atlanta NAACP president, was one of the black leaders here putting the compromise school plan together. Not the only one by any means but a man who in the process showed a good deal of courage. The national NAACP lawyers made several efforts to undermine King within the black community in Atlanta, hoping to leave him isolated. What they found in every effort is that King's vision of a compromise desegregation plan, one which both white and black communities could accept and which among other things would keep white pupils in the school system, is one generally shared in the black community.
>
> "Times have changed since 1954," said King the other day, after national NAACP officials had again demanded that the Atlanta chapter renounce the compromise plan, "and the leadership of the civil rights movement is going to have to rethink the whole question of how you educate to the maximum extent possible inner city kids...when we have applied all the available tools to eliminate segregation and we still come up with thousands of students who appear to be hopelessly mired in the ghetto by housing patterns, etc., then I feel we have a responsibility to broaden our approach and deal specifically with the problems of those particular students."
>
> The truth is that King and other black Atlanta leaders do care what happens to the students, and to the quality of education, and to the entire community. That's more than can be said about the national NAACP.
>
> July 7, 1973

Finally, the paper ran an article from the Race Relations Reporter which expressed the new attitude as it related to the Atlanta school controversy.

> As the discussion has raged in our city, and in many other cities since 1954, one of the most familiar arguments is this: We have to send our children to white schools because that is the only way they will get a better education. We have to send our children to white schools, some parents say, because in the nature of things that is the only way they will get a better education. Now I am both amazed and troubled by that kind of statement, and I want to follow its logic.
>
> "To begin thinking about it, I want you to consider some people whom I will name, Martin Luther King, Jr., Benjamin Mays, Lonnie King, Slater King, and Vivian Henderson. I want you to think about Fannie Lou Hamer and Andrew Young and Maynard Jackson and the thousands lime them. Then let us ask ourselves: Are we saying that these people would have been better human beings if they had gone to white schools? If they had gone to the same school as Richard Nixon and Lieutenant Calley and all the perpetrators of Watergate? And the people who run the Bureau of Indian Affairs, and those who own the corporations that exploit South African Blacks? I find that an insult, if that's what we are saying.
>
> "The critical issue in education is not whether black children sit in the same classroom as white children. The critical issue today cuts across white schools and black schools in Atlanta and in the nation. It is not who is sitting where but what is the direction, the purpose and the content of that education." That should be the heart of our enquiry, not what percentage of black children is in the school.
>
> August 18, 1973

Winning Final Approval

Four appeals issued from the District Court order approving the compromise plan--from the LDF, NAACP, CORE, and ACLU. The LDF appealed the decision on four grounds. First, the plan was unconstitutional because it did not comply with Swann's provision that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools."[33] According to the LDF, Stolee had shown that pairing was feasible; thus by avoiding the use of pairing, not every effort was made by the Board to eliminate one-race schools.

Second, there had been no evidentiary basis for the finding that the settlement was fair and reasonable. The LDF brief cited a fifth circuit case from 1971 which held that the determination of the reasonableness of a compromise class action must be made on the basis of "facts and the law." The brief cites other circuit cases that rule that objecting members of the class affected by the proposed compromise have the right to present evidence and to participate as litigants.

Plaintiffs third claim was that the settlement did not have the consent of the initial attorneys for plaintiffs. "It is simply insufficient to ignore the unanimous opposition of the lawyers who maintained this litigation for 15 years because one of their number briefly stated that she would not make an objection to the settlement although she simultaneously refused to sign it." [34]

The fourth ground for reversal offered by plaintiffs related to some conflict of interest charges made earlier by Hames, ACLU attorney in the metro case who wanted to invalidate the settlement. The charges centered on Bill VanLandingham, one of the business communities' representatives on the School Board who had been a key figure in the negotiations, Lonnie King, and

King's lawyer Ben Spaulding. VanLandingham was a Vice President of an Atlanta bank from which both King and Spaulding had borrowed money. It was charged that because of their commitments to VanLandingham's bank, King and Spaulding were not negotiating in the best interests of the class. An additional charge had been made against VanLandingham for waging economic threats against one Board member who opposed the settlement. Shortly after the compromise was reached, Hames' motion to take depositions regarding her charges was denied by the court on the grounds that she did not have standing in the case. Plaintiffs charged that the failure of the court to permit discovery about possible conflict of interest and collusion rendered the settlement invalid.

The Appeals Court ruled, in August, 1973, that evidentiary hearings were necessary in this case:

> This court is unable to reach the merits of this cause for lack of a fully developed district court record. The cause therefore must be remanded with directions to provide the parties an adequate opportunity for discovery and hearings at which the presentation of testimony and the right of cross-examination can be afforded. (487 F 2d 681.)

But the court never made it clear whether an evidentiary hearing is a legal requirement or whether the court deemed a hearing necessary in this situation with all of the dispute over representation. In either event, the higher court took a different approach from the District Court, which put much store in the fact of a settlement per se. Judge Smith, reflecting on the case, said he still believes that there was a legal agreement since the settlement was signed by an attorney from each party.[35]

The Appeals Court also ordered the District Court to hold hearings on the motions for intervention and offered legal authority to justify the order. The Court cited two Fifth Circuit cases as controlling on the issue of intervention.

In Hinds v. Rapides Parish School Board, 479 F. 2d 762 (1973) the Court held that the proper course for groups seeking to question implementation of desegregation orders is to file a petition for intervention that would bring to the attention of the district court

> the precise issues which the new group sought to represent and the ways in which the goal of a unitary system had allegedly been frustrated.
>
> The district court could then determine whether these matters had been previously raised and resolved and/or whether the issues sought to be presented by the new group were currently known to the court and parties in the initial suit. If the court determined that the issues these new plaintiffs sought to present had been previously determined or if it found that the parties in the original action were aware of these issues and completely competent to represent the interests of the new group, it could deny intervention. If the court felt that the new group had a significant claim which it could best represent, intervention would be allowed.

The difficulty in applying the above case to the Atlanta situation is, as Judge Smith kept insisting, that the would-be intervenors would not be a "new group" and there would be no "new plaintiffs". The second case cited as controlling is Lee v. Macon County Board of Education,482 F.2d 1253 (Fifth Cir. 1973), where it is emphasized that a petition for intervention must contain precise and clear delineation of contentions so that the court may base its judgment on the merits of the claim.

The court remanded the case with the following instructions:

> With no lack of sensitivity to the burdens imposed upon judges who are attempting to expediently conduct the business of a heavily burdened district court, such procedures cannot form the basis for adjudication of the merits of the complex issues in this litigation. A reasonable opportunity for discovery must be afforded. In addition, minimum procedural due process requires adequate notice of a hearing at which an opportunity will be afforded the parties to present sworn testimony and to cross-examine witnesses who sponsor opposing views. (487 F.2d 683.)

Both sides were happy with the remand which allowed the plan to stand for one year while the determination on the merits was being made. It gave the defendants an opportunity to show that the plan could work and it allowed the plaintiffs to present evidence in objection to the plan.

Following the remand the court allowed the permissive intervention of the national NAACP group, the metro group, and the Atlanta Chapter of CORE. Two sets of objections to the plan were subsequently filed--one on behalf of the metro group, and the other jointly for the original plaintiffs and the NAACP intervenors. The CORE intervenors did not elect to participate further in the proceedings after the allowance of their intervention.

In January, 1974, the defendants submitted a detailed report on the implementation of their plan during the 1973-74 school year. Administrative positions had been largely filled, and the teacher component had been implemented. The majority-white School Board had made the administrative appointments. Lonnie King had wanted to negotiate for a role in selecting staff but Spaulding advised against it. Now, neither is satisfied with the performance of the administration and Spaulding wishes they had tried to get some say in the process of hiring the new staff.[36] King goes so far as to say that he believes the School Board purposely selected incompetent people to make black control look bad.[37]

The new superintendent, Alonso Crim, took over on July 1, 1973. He came from the superintendency in Compton, California, a position he had held since completing a doctorate at Harvard in 1969. Letson left Atlanta to become Dean of the School of Education at Valdosta State College in Georgia. He was retained on the payroll as a consultant in order to complete his contract with the APSS.

Judge Henderson held two days of hearings on the compromise plan in April, 1974. Smith had by this time resigned from the bench. Rindskopf, Spaulding, and Hames represented plaintiffs in the hearings, each with a different agenda. Rindskopf still sought to show that the plan was unconstitutional because it had failed to use available remedies. Spaulding hoped to defend the plan and as such deferred to Fortson, who had the identical purpose. Hames wanted to show that the plan had failed to work, in order to bolster her clients' case for a metropolitan solution.

Henderson confined the hearing to the subject of the plan, maintaining that the process by which the plan was arrived at was irrelevant to a trial on the merits. The hearing was structured to allow the defendants to present information on the implementation of the plan, with plaintiffs' counsel afforded the opportunity to cross-examine. Spaulding questions this approach, claiming that the purpose of the hearing was to hear plaintiffs' objections to the constitutionality of the plan rather than to put the burden on the defendants to show compliance with the plan. The Court replies:

> I want to give the School Board an opportunity to explain the workings of the plan for the simple reason they have obviously had some experience with it, since it's been put into effect, and that, to me, would have some bearing on whether or not it is a workable plan, quite frankly.[38]

Fortson calls as witnesses the six Area Superintendents to describe the operation of the plan in each area. They testify that the teaching and administrative portions of the plan are virtually complete. Rindskopf questions the witnesses about remedies considered in their areas and gets admissions from most that pairing was not considered as a possible remedy for their area.

On the second day of the hearing the issue of representation surfaces once again. Rindskopf questions Spaulding about his ability to represent the class and objects that he failed to notify her and Hames about the meetings of the Biracial Committee. Fortson objects to treating these subjects in a trial on the merits. And Henderson admits that he is allowing it to satisfy the Appeals Court:

> Quite frankly, I have some fear that if I send it back to the Fifth Circuit, they will say I didn't put in everything I should, and I am trying to keep this from ever coming back for the purpose of having an additional hearing for some reason that the Fifth Circuit may think.[39]

Henderson concludes the hearing by stating his concern for ending the lawsuit so that the APSS "can get on with the business of educating children. That's the biggest tragedy of the whole thing...."[40]

The District Court order of May 1, 1974 approved the compromise plan as the final decree. Henderson introduces a new legal argument in defense of the unitary ruling which is merely that a black-controlled school system can be presumed not to discriminate against blacks.

> A majority black Atlanta School Board, chaired by Dr. Benjamin Mays, a respected black educator and civil rights leader, was elected in the recent city elections. As noted earlier, the administrative staff of the system is over two-thirds black and is under the able supervision of Superintendent Alonzo A. Crim, a black educator and administrator with an impressive list of credentials and accomplishments. In short, it would be difficult to attribute to those presently charged with the operation of the Atlanta public schools any intention to discriminate against black students enrolled in that system or to continue to effects of past discrimination. (Unpublished opinion May 1, 1974, p. 7)

The court points out that in 12 of the 32 schools for which the plan prescribed specific remedial action the goal has not been attained but points to the "substantial overall progress" and the modifications proposed for the 12 schools. Henderson answers the plaintiffs' objection to blacks bearing the desegregation burden by stating that transfers under M-M are voluntary and that there is no evidence that school officials failed to encourage white participation.

Swann is offered in defense of one-race schools, as it has been since the decision was rendered three years earlier:

> For the fourth time in as many years, the court concludes that the Atlanta school district is unitary and has purged itself of all vestiges of the formerly state imposed dual system...
>
> The fact that there remain schools which have racially distinctive student bodies does not necessarily indicate the presence of a dual system. See Swann, supra. Indeed, the Supreme Court emphasized that "existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system." Ibid, 402 U.S. at 19. The evidence clearly establishes that, in these particulars, there is no basis for challenging the proposal of the school board. Taking into account the effect of the plan as a whole, the percentage figures for racial distribution of students in the individual schools do not render it constitutionally invalid.
>
> Obviously, in a large urban school system in which black students comprise 83% of the total enrollment and most of that number live in highly concentrated, racially distinct neighborhoods in and around the downtown area, the existence of a substantial number of mostly black schools is inevitable. Moreover, although there are still some schools with predominantly white student enrollments, under the plan as now proposed for the 1974-75 school year, all schools will have at least a 25% black student enrollment. Furthermore, considering the present racial distribution of administration and staff members, even those schools with relatively lower black student enrollment percentages can hardly be characterized as "white" schools in the traditional sense.
>
> Across the board racial balancing at all schools is not required. See Swann, supra. Nor does the court believe that the Constitution requires further attempts to dilute the relatively few remaining majority white schools in the Atlanta system by sprinkling those white students left into predominantly black schools. The obvious problem now confronting the Atlanta schools is a dearth of white students. Given the total circumstances, this plan prescribes an educationally sound and workable solution that "promises realistically to work now." Green, supra.... (Unpublished opinion, May 1, 1974, pp. 12-13.)

The court orders, as before, that all disagreement on the plan first be submitted to the Biracial Committee prior to resort to court motion. In addition, the order provides that counsel for intervenors be given notice of meetings and afforded the opportunity to participate on an equal basis. The court maintains that "many of the objections to the plan now raised could have been avoided had the plaintiff-intervenors and their counsel of record been allowed to participate in the deliberations of the Biracial Committee." (14) It is ordered that the committee meet at least quarterly. However, Henderson stated in an interview that the Biracial Committee lost interest after the settlement and the court did not bother to extend its term or appoint members.[41] And, regarding the other form of oversight for plan implementation, the APSS could not produce any semi-annual reports and concluded that it must never have prepared any.

Implementation of the plan was not really at issue because it was the process of arriving at the plan rather than the content that underlay the unitary finding. There was very little actually to implement. The administrative positions were filled. All hiring from now on is simply to be on the basis of merit. Similarly, teachers need not be reassigned once the initial compliance with Singleton was achieved. Most of the white schools were integrated the first year and the unitary ruling was not contingent upon integration of the remaining white schools. This, together with everyone's exhaustion over the desegregation issue, explains why there was no period of implementation or follow-up on the plan.

Three of the plaintiff parties--LDF, NAACP, and ACLU--appealed the decision but this time to no avail. They claimed that the plan was constitutionally inadequate in that it left 92 of the 148 schools over 90% black and that blacks bore the burden of desegregation. Appellants urged that existing precedent would not allow the court to affirm the unitary status of a school district which has never used non-contiguous pairing, has never bused white children into black schools, and in which over 60% of its schools are substantially or all black. Responded the Fifth Circuit:

> These contentions appear to be supported by substantial precedent. However, for today and in Atlanta, the unique features of this district distinguish every prior school case pronouncement...The aim of the Fourteenth Amendment guarantee of equal protection on which this litigation is based is to assure that state supported educational opportunity is afforded without regard to race; it is not to achieve racial integration in public schools.(522 F. 2d 719.)

This portion of the order prompted Fortson to comment: "What this is saying is that the mere fact that people are segregated doesn't necessarily mean that they are discriminated against. They (Circuit Court judges) are kind of picking up on the mood of the country."[42]

V. Concluding Observations

The Atlanta case demonstrates two weaknesses of the current legal approach to school desegregation remedies. One is in the class action nature of desegregation litigation. Typically, issues of appropriate class representation do not arise, not because all plaintiffs are in agreement about the remedy but because lawyers are in agreement. In this case it was the split among the plaintiffs' attorneys that motivated the attorneys to seek out individual members of the class who objected to the compromise remedy. Whether or not there was substantial support for the national NAACP position, that position would never have been advanced had the split among counsel not developed. Thus remedies may be evolved and approved without, as Judge Smith would say, any members of the class ever appearing in the courtroom. Attorneys do wield considerable power in fashioning remedies that will affect a city's entire population.

The second weakness is the deficiency of legal doctrine as a guide for lower court actions. In this case, Swann sustained both sides of the legal debate for five years. One side saw in Swann the mandate to try all available desegregation tools in the effort to eliminate one-race schools. The other side saw just as clearly in the ruling that the existence of racially identifiable schools does not necessarily imply discrimination, and that there is thus no affirmative duty to desegregate all schools in a system. The courts, as Judge Smith observed, didn't know how to resolve this apparent dilemma.

The settlement approach did not ease the dilemma because Court approval of the settlement as constitutional was still required. But it did serve to focus court attention on the process, rather than the substance, of the remedy. The District Court, with its bias against the body-mixing substantive approach and its concern for educational quality, was willing to approach the substance of the remedy in a flexible way. More important than the substance was an agreement that would get the parties out of the courtroom and into the classrooms. The Appeals Court, however, was involved in the nationwide effort to formalize the state of desegregation law, and was thus not amenable to the lower court's flexible approach. Even so, the Appeals Court was not willing or able to make judgments regarding the substance of proposed remedies. All but one of its remands were addressed to the process of remedy-framing. First the court ordered that plaintiffs be afforded an opportunity to prepare an alternative plan. Next it sent the first proposed settlement back to the lower court because of questions of class representation. Finally it ordered evidentiary hearings on the merits of the plan and the motions for intervention. The only Appeals Court ruling on substance was the October, 1972 order which directed that the new plan must at minimum use pairing. But by ultimately approving a plan that paired only four schools out of 150, the court revealed the limited importance given to the substance of the remedy.

The one substantive goal established by the courts has questionable legal validity and seems like a token concern for substance. That is the requirement that all of the previously all-white schools be desegregated. There was no comparable objective for desegregating black schools and the final settlement left 92 all- or nearly all-black schools. As the Appendix shows, the outcome of this approach is that a majority of white students attend integrated schools, while about 80% of blacks attend segregated schools. Somehow this seems to do injustice to Brown, which was premised on the belief that segregating blacks, not whites, does irreparable damage and to their "hearts and minds." While Atlanta blacks now dispute this premise of Brown, which is one reason why segregated black schools were allowed to remain, there was never any justification advanced for requiring that the majority of whites attend integrated schools.

NOTES

I. The Setting: Atlanta

1. Paraphrase from interview with Lyndon Wade, April 6, 1978.
2. Readers Digest, June 1975.
3. Interview, Al Evans, 4/3/78.
4. New Republic, June 7, 1975.
5. Story recounted by Al Evans, interview, 4/3/78.
6. New York Times Magazine, April 7, 1974.
7. Ibid.
8. Ebony, February 1974.
9. Atlanta Constitution, 4/4/78.
10. Ibid.
11. Ibid.
12. "Black Mayor, White Power Structure," New Republic, June 7, 1975, pp. 9-11.

II. Overview of the Litigation

1. Information for this section is pulled together from School Desegregation in Metro Atlanta, 1954-1973, by Research Atlanta, a dissertation covering the early years of the litigation by Mark Huie of the Atlanta Public School System, coverage of the litigation in the Atlanta Constitution, and court orders.
2. Atlanta Constitution, 3/14/71.
3. Atlanta Constitution, 1/24/71.
4. Ibid.
5. Atlanta Constitution, 4/23/71.
6. Atlanta Constitution, 6/11/71.
7. Atlanta Constitution, 7/6/71.
8. Atlanta Constitution, 10/22/71.
9. From interview with Bill VanLandingham, 4/5/78
10. Atlanta Constitution, 1/23/73.

11. Ibid.

12. Atlanta Constitution 2/11/73.

13. Atlanta Constitution, 2/25/73.

14. New York Times, 2/24/73.

15. Atlanta Constitution, 3/8/73.

16. Interview, Al Evans, 4/3/78

III. Remedy-framing in Light of Swann: 1971-1972

1. Interview, Judge Sidney Smith, 4/4/78. All comments on pp. 1-4 are attributed to Smith unless otherwise stated.

2. District Court hearings, 12/28/72, pp. 42-43.

3. Interview, Judge Albert Henderson, 4/7/78.

4. Information for this section is from Plaintiff-Appellants 1972 brief.

5. Interview, Ed Cook, 4/3/78.

6. Transcript of Proceedings. U.S. District Court, Northern District of Georgia, Atlanta Division, Civil Action 6298, May 3, 1972, Vol. 1, pp. 18-20.

7. Ibid., pp. 52-54.

8. Ibid., pp. 94-95.

9. Ibid., pp. 79-80.

10. Ibid., p. 102, 122-123.

11. Ibid., p. 74.

12. Ibid., p. 127.

13. Ibid., pp. 204-5

14. Ibid., pp. 174-176.

15. Transcript of Proceedings, U.S. District Court, Northern District of Georgia, Atlanta Division, Civil Action 6298, May 4, 1972, Vol. 2, pp. 34-37.

16. Ibid., p. 42.

17. Ibid., p. 123.

18. Ibid., p. 129.

IV. Remedy-framing Under Rule 23(e): The Settlement Approach

1. Interview, Bill VanLandingham, 4/5/78.
2. Interview, Benjamin Spaulding, 4/7/78.
3. Interview, Bill VanLandingham, 4/5/78.
4. Ibid.
5. Research Atlanta, School Desegregation in Metro Atlanta, 1954-1973, p. 21.
6. Expressed in interviews with VanLandingham, Spaulding, and Warren Fortson 4/4/78.
7. Interview, Benjamin Spaulding, 4/7/78.
8. Ibid.
9. Interview, Warren Fortson, 4/4/78.
10. Transcript of Proceedings, U.S. District Court, Northern District of Georgia, Atlanta Division, Civil Action 6298, December 28, 1972, pp. 2-4.
11. Ibid., pp. 7-10.
12. Ibid., p. 31.
13. Ibid., pp. 39-42.
14. Atlanta Constitution, 1/28/73.
15. Atlanta Constitution, 2/24/73.
16. Atlanta Constitution, 2/16/73.
17. Interview, Bill VanLandingham, 4/5/78.
18. Interview, Ed Cook, 4/3/78.
19. Interview, Warren Fortson, 4/4/78.
20. Legal Documents, Compromise Plan, p. 13.
21. Atlanta Constitution, 2/20/73.
22. Ibid., 3/4/73.
23. Ibid., 5/8/73.
24. Ibid., 3/4/73.
25. Transcript of Proceedings, March 8, 1973, pp. 9-10.

26. District Court Order, March 23, 1973, unpublished.

27. Interview, Judge Sidney Smith, 4/4/78.

28. Transcript of Proceedings, March 8, 1973, pp. 19-20.

29. Transcript of Proceedings, March 29, 1973, pp. 9-12.

30. Atlanta Constitution, 3/30/73.

31. Transcript of Proceedings, March 29, 1973, p. 84.

32. Transcript from District Court hearing of April 8, 1974, p. 211.

33. 402 U.S.1, at 26, cited in Brief for Plaintiff-Appellants, Abernathy, et al., 1973, p. 46.

34. Plaintiffs-Appellant brief, 1973, p. 53.

35. Interview, Judge Sidney Smith, 4/4/78.

36. Interview, Spaulding, 4/7/78.

37. Interview, Lonnie King, 4/6/78.

38. Transcript from District Court hearing, April 2, 1974, p. 23.

39. Transcript from District Court hearing, April 8, 1974, p. 195.

40. Ibid., p. 214.

41. Interview, Judge Albert Henderson, 4/7/78.

42. Atlanta Constitution, 10/24/75.

INTERVIEWS

Dr. Jarvis Barnes, Division of Research and Development, Atlanta Public School System, telephone interview, 3/21/78.

Edward S. Cook, Jr., Superintendent of Gainsville Public Schools, previously Assistant Superintendent of Atlanta Public School System, personal interview, 4/3/78.

Dr. Joe Edwards, State of Georgia Department of Vocational Rehabilitation, previously Deputy Superintendent of Public Instruction, State of Georgia, personal interview, 4/4/78.

Al Evans, Assistant Attorney General, State of Georgia, Attorney for defendents in metropolitan desegregation lawsuit, personal interview, 4/3/78.

Warren Fortson, Attorney for School Board, personal interview, 4/4/78.

Judge Albert Henderson, District Court Judge for Northern District of Georgia, personal interview, 4/7/78.

Mark Huie, Atlanta Public School System, telephone interview, 3/21/78.

Lonnie King, Chairman of the Onyx Corporation, past President of the Atlanta Chapter of the NAACP, personal interview, 4/6/78.

A.B. Padget, Vice President, Trust Company of Georgia, personal interview, 4/5/78.

Judge Sidney O. Smith, member of law firm Alston, Miller, & Gaines, Atlanta, previously District Court Judge for Northern District of Georgia, personal interview, 4/4/78.

Benjamin Spaulding, Federal Liaison for City of Atlanta, previously attorney for Lonnie King and plaintiffs, personal interview, 4/7/78.

Horace Tate, State Senator, Executive Director of the Georgia Association of Educators, member of School Board 1965-1969, personal interview, 4/4/78.

William VanLandingham, Vice President Citizens and Southern Bank, member of School Board 1971-1974, personal interview, 4/5/78.

Lyndon Wade, President of Atlanta Urban League, past Chairman of Biracial Committee, telephone interview 3/21/78; personal interview 4/6/78.

APPENDIX

Enrollment and Desegregation in the Atlanta Public School System: 1960-1976[*]

	Enrollment	% black	% of schools desegregated	% in desegregated schools	
				of blacks	of whites
1960-61	102,000	44	0	0	0
1961-62	111,000	43	3	0	8
1962-63	112,000	41	7	0	17
1963-64	114,000	43	7	0	16
1964-65	113,000	50	3[**]	1	4[**]
1965-66	108,000	56	4	2	4
1966-67	104,000	57	6	3	8
1967-68	110,000	59	15	5	23
1968-69	111,000	61	19	9	28
1969-70	106,000	66	23	11	38
1970-71	103,000	67	31	20	57
1971-72	100,000	72	31	18	65
1972-73	96,000	77	31	19	58
1973-74[**]	87,143	83		22	
1974-75					
1975-76	80,000	85	38		

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[*] All data from 1960 to 1972-73 is from School Desegregation in Metro Atlanta--1954-1973, a publication of Research Atlanta. Data for subsequent years is from various sources and is not available in complete form.

[**] At this point the definition of "desegregated" was changed to include only schools with more than 10% of each race. Before, any school with at least one student of each race was considered desegregated.

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PASADENA

Mitchell H. Feigenberg

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INTRODUCTION

Spangler v. Pasadena City Board of Education forms the core of an interesting and important desegregation story. The story is interesting for a variety of reasons, the first being the vitriolic style and personality of Judge Real, whose piercing commentary, questions and rulings pervade the courtroom proceedings. The history of Pasadena's educational system, the plans, proposals and decisions of the School Board over the past 20 years and the actors involved in that history--parents, teachers, school administrators, businesspeople, and students--form an intricate and interrelated tableau which is simultaneously the backdrop to and the basis of the courtroom drama.

The Pasadena story is important because Pasadena is the American urban city writ small, a town in triansition from majority white to majority black. Additionally, Spangler was one of the earliest northern desegregation cases, filed by the original plaintiffs in 1968, joined by the Justice Department in 1969. The case was resolved initially by the imposition of a far-reaching court order to desegregate. In effect, Judge Real reorganized student attendance, staff recruitment and school construction policies of the entire district. Later, Spangler became the first case in which the Supreme Court went beyond defining and delimiting the range of permissible remedies which a District Court may impose in righting the wrongs of de jure segregation. Here, the Supreme Court ordered lower courts to make a new and narrower determination of equitable relief.

The first of the "interesting" aspects of the case, Judge Real himself, could be the focus of a fascinating biography. Judge Real's role in the case was pivotal. His incessant search for a graspable understanding of the truth at the 1970 trial, his far-reaching desegregation order and the Plan which the Administration designed to meet its requirements, his demands for proof that segregation had been eliminated at the 1974 trial--all illustrate the crucial role which Real played in this history.

And yet, his role has been a problematic one. He has been, as the Supreme Court points out, unclear in distinguishing de jure from de facto segregation; in fact, he admits that he sees no important difference between the two. In the absence of this distinction, any school in which the numbers of black and white students do not reflect proportionately the numbers of the entire district must be viewed as intentionally segregated. In additon to violating the precedent set in Swann, this conclusion would effectively leave any school district ever in court for desegregation purposes forever at the mercy of a district court judge. On the other hand, as Judge Real is quick to point out, if the discretion of the district court in a case like Spangler is limited to an initial sweeping order, is it not "an order for a day," an unenforceable admonition which need have no lasting effect on the school district?

The central issue is timing: How long can a district court constitutionally enforce a desegregation remedy? Or, how long does it take to transform a segregated school district into one which is unitary? As Real sees it, the Supreme Court answers these questions by saying that a district court cannot retain jurisdiction over a school district until it has been fully desegregated and is likely to remain that way for a foreseeable period of time. Appellate Justice Ely and Supreme Court Justices Marshall and Brennan agreed. As the majority of the Supreme Court sees it, if a racially neutral system is established in compliance with a desegregation order, how the school district later evolves, absent further acts of de jure segregation, is no business of the courts. Thus, the range of remedy is altered acutely. A district court cannot order a full remedy without losing jurisdiction. One obvious response which might be expected from liberal, integration-minded judges is the use of timetabled, step-by-step desegregation plans which, by allowing for a long period of implementation, require a long period of continuing jurisdiction. The opportunity to modify one's injuction thus remains, and the district court "keeps its hand" in the evolution of the school district's response to its own changing racial composition.

The history of the educational system in Pasadena and the relationships between and among boards, administrators, teachers, and parents form another fascinating story. Pasadena was--and is--a white-dominated town. The divisiveness caused by opinionated points of view, conservative and liberal alike, has been a major roadblock to improving physical plant facilities and personnel and student performances. The money and energy spent by each side trying to get its own way has been a tragic waste. If, as former school superintendent Ray Cortines suggests, "the greatest way to victory is through compromise," the citizens of Pasadena have seemed purposeful in their pursuit of defeat.

Many of the individuals involved in the Pasadena desegregation story are well informed; nearly all of them are highly opinionated. The particular groups--the Pasadena Appeal Committee, the League of Women Voters, the Spanglers--are important not so much for what they did, but for what they represent in the American city. These actors are all of us--integrationists, segregationists, racists, property owners, civil libertarians. No clear understanding of right or wrong emerges from knowing their stories. The resolution of the motives, desires, and goals of the conflicting groups within the school district has been impossible. Divided into antagonistic camps, the citizens of Pasadena fought for dominance within the power structures of the community at large and, in particular, within all of the institutions which influence the school system. Cooperation is often difficult in small, like-minded groups of people; in a community faced with a not totally popular court order, it has proved impossible.

THE TOWN

Pasadena was founded in 1874 by Indiana colonists who purchased 15,000 acres of the Mexican land grant of Rancho San Pasqual.[2] It was incorporated in 1886 with a "thriving population of 2700."[3] The name "Pasadena," which means "Crown of the Valley" in Chippewa, was presented to the colonists by a Dr. T. B. Elliot, who argued that it was appropriate because the small town " . . . was at the extreme end, and in the most beautiful and romantic portion, or the famous San Gabriel Valley, and therefore was entitled to assume a name which was so descriptive of the locality, besides being beautiful, musical, and euphonious."[4]

The list of prominent individuals who lived in or came from Pasadena and its environs further reinforces the impression of Pasadena as a home for the rich and influential. William Scripps, of the publishing and newspaper family, lived in the area from 1902 to 1914;[6] Donald R. Wright, a member of the State Supreme Court, was born in Pasadena in 1909;[7] General George S. Patton, Jr., born in the nearby town of San Marino in 1885, a attended high school in Pasadena;[8] Henry Huntington, whose "'Big Red Cars' tied together scattered cities of the Los Angeles basin into the Pacific Electric Railway System,"[9] established residence in the Pasadena area. After his death in 1927, his mansion and the famous art collection it houses were opened to the public as the Huntington Library.[10] But Pasadena was never peopled only by those of affluence and power. As one 1924 tribute points out, "(t)he modest cottages of the workers blend in harmony with the mansions of the wealthy, beautiful laws, flowers, and trees are common to all . . . ."[11] And

> while it is true that there is a large number of well-to-do people who make their residences here, it should be borne in mind that of the nearly 70 thousand persons who have chosen this city for their homes, probably 75 percent are engaged in gainful occupations.[12]

It is this idyllic and picturesque history which set the tone for Pasadena's evolution through World War II. Even today, this sunny view of reality molds the self-image of many of Pasadena's citizens. More important for this analysis of school desegregation, however, are the changes in the demographic characteristics of the community which first became noticeable after the war.

Pasadena has welcomed Negro residents since the late 1800s, when southern coloreds were actively sought for housekeeping and servant work.[13] In the early years, their numbers were small. By 1940, blacks comprised only 3.7 percent of the population of the Pasadena/Altadena area.[14] By 1950, the number of blacks had doubled, largely due to a post-World War II inf influx phenomenon.[15] After 1950, another force comes into play: Affluent blacks moved to Pasadena as a symbolic step out of the central city.[16] To them, Pasadena was hospitable and comfortable, if not affluent, in marked contrast to other southern California cities which tolerated black immigrants. For the "more affluent blacks,"[17] Pasadena had become a symbol of success. Side by side, then, two groups of blacks were immigrating to Pasadena: Poorer, less educated, largely southern blacks and relatively affluent, upw upwardly-mobile, middle-class blacks.

The numbers of Mexican-Americans in Pasadena also increased substantially in the 1950s and 1960s[18] and this increase is implied, if not explained by two factors: First, the high percentage of Mexican-Americans living in southern California suggests the possibility of their presence throughout the the area. Second, the attractiveness of Pasadena to both poor and not-so-poor blacks was not lost on the Mexican-Americans.

The immigration of substantial numbers of minorities eventually brought changes to the student population of the school district. The Pasadena Plan attests to a 12.7 percent increase in the number of black students, a 15.5 percent decrease in whites, and a 1.8 percent increase of "others" (Orientals, Mexican-Americans) from May of 1962 to October of 1969.[19]

Paralleling these immigration and minority student phenomena was an internal migration pattern: whites were moving eastwards within Pasadena.[20] As black attendance at an elementary school approached 50 percent, as the number of black families on a block surpassed some intolerable threshold level, "white flight" occurred, sending many white families eastward within Pasadena or out of the city altogether.[21] Black and white areas of town became easily identifiable: the older, cheaper homes in the northwest of the city formed the core of an emerging ghetto; new housing developments sprang up in the eastern and southern parts of town and were rapidly filled by white Pasadenans.[22] A substantial demographic shift was taking place in Pasadena.[23]

THE SCHOOL BOARD

Through the 1950s and 1960s, the district enforced segregation in two ways. At the elementary level, it adopted policies which kept white schools white. As pointed out in the 1970 Spangler opinion,[24] the School Board's policies were designed to keep black children in black schools. In some cases, the number of classrooms at these schools was increased by adding "transportables," portable classrooms that are comparable to Quonset huts in terms of comfort and attractiveness, even though adjacent white or integrated schools were not being used at full capacity. Or if, for some reason, transportables were not or could not be installed, black schools would simply be required to enroll more students than their facilities were designed to accommodate.

At the junior and senior high school levels, a more passive approach proved sufficient. During the 1950s and 1960s, there were enough junior and senior high whites throughout the city tc ensure a majority white student body in nearly every one of the district's secondary schools. Thus, no active manipulation of attendance or construction policies was necessary at the secondary level: simple "common sense" feeding of the right combination of the elementary schools to the junior highs and of the junior highs to the senior highs kept whites in the majority at almost every Pasadena secondary school.

For nearly two decades, the School Board had been able to exercise total control over the racial quality of the District, but, in 1960, the Board received some bad news. The town of La Canada had decided to withdraw from the School District.[25] A loss of 900 students was anticipated by school officials,[26] and the Pasadena School Board was faced with another in the series of decisions which would eventaully lead it to the courtroom of Judge Manuel L. Real.

In 1961, La Canada withdrew from the Pasadena Unified School District and established its own district.[27] La Canada's secession meant that something had to be done with Pasadena's Linda Vista elementary school students, all of whom were white. Formerly, upon reaching the seventh grade, these students had attended the junior high in La Canada; now, they would have to be assigned to one of three junior highs in Pasadena, McKinley, Elliot, Or Washington. Washington was closest to the Linda Vista area; it was also the blackest of the three schools. Alarmed residents of the Linda Vista area urged the Board to assign Linda Vista pupils to McKinley, a "whiter" school, and they threatened to withdraw from the district and form their own school system if this assignment was not made. The result of their lobbying was the acquiescence of the Board and the creation of a gerrymandered attendance zone. Shortly thereafter, a lawsuit was filed against the School District.[28]

This 1963 suit was an attempt by a black student, Jay Jackson, to force the School Board to transfer him from the predominantly black Washington to the less black Elliot Junior High School.[29] While redressing only Jackson's specific grievance, the State Court took the opportunity to speak on some broader issues of race and schooling. The Court pointed out that equal opportunity to an integrated education must be provided to all students,[30] that separate, but equal is a denial of both equal protection and due process,[31] and that school boards must "take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause."[32] Here, the State Court went beyond the requirements set forth by the United States Supreme Court in Brown and asserted that, in California at least, the de jure/de facto distinction is irrelevant if the alleviation of racial imbalance is "reasonably feasible."[33] This decision put Pasadena on notice that its overall policies could well be found in violation of the California Constitution. Nonetheless, the Court ordered nothing more than the transfer of Jackson. Since only his specific complaint had been filed, only it could be remedied.[34]

The Jackson case triggered a flurry of activity. For those concerned with education in Pasadena, the period of 1962 thorugh 1968 when Spangler was originally filed, was an active one.[35] Ad-hoc citizens' groups suggested numerous plans intended both to promote integration and to improve educational quality.[36]

In 1962, a citizens staff committee was appointed at the direction of the Board to review districting problems. The committee recommended senior high school attendance area changes which would have increased integration substantially, but the Board rejected these recommendations.[37] Instead, the Board chose to initiate, in 1964, an open enrollment plan which allowed both black and white students to escape from predominantly black schools.

The Geographic and Controlled Open Districting Plan, as it was called, was adopted on June 11, 1963, and implemented in September of 1964. As originally designed, it allowed all students residing in the Open District to attend whichever high school they chose, so long as there was space available. The Open District--an 80 percent black area--had until then been in the Muir High School attendance area. The goal of the plan was to increase the number of blacks at Pasadena High but the most important result of the plan was that very few whites chose Muir: less than 30 percent of the whites in the Open District attended Muir during the four years the plan was in operation. In 1968, the Board belatedly mandated Open District blacks to Blair or Pasadena High Schools and Open District whites to Muir High School, but by that time only 100 whites lived in the Open District.[38] The effect of the new mandate on Muir's racial balance was minimal at best.

Other recommendations were made to the Board. In 1964, Board member Walter Shatford urged the study of a triad plan, combining the attendance areas of adjacent elementary schools into groups of three. The Board's response was to discontinue entirely the consideration of restructuring the elementary school attendance areas.[39]

There may also have been some anti-integration sentiment in the administration. Dr. Joseph Hanson was the head of the District's Research Department from the late 1950s until the early 1970s. Throughout the period, he gave selective data to the Board or misinterpreted the full data. For example, in 1961, when the Board moved Noyes and Burbank elementary schools out of the Muir and into the Pasadena High School attendance zone, PHS was already overcrowded. Hanson apparently misled the Board, his Ph.D. and ability to interpret statistics "overawing" the common sense of its members.[40]

For a variety of reasons, then, little was done to promote integration in Pasadena after the Jackson decision. In fact, of all the programs initiated by the Board, only the Geographical and Controlled Open District described above decreased the numbers of blacks at a majority black school, and, even so, only in one year, 1964.[41]

In 1966, the Board shifted San Rafael elementary school from the Muir high school attendance area to that of Blair high school.[42] The San Rafael area is an upwardly mobile white neighborhood in which most of the children are expected to attend college after their high school graduation. Given a few more Board decisions like this one, it was apparent that Muir high school would go the way of Washington junior high: its percentage of black students would increase until it became predominantly black. A change of this sort at the high school level would have city-wide impacts. Many black students would receive a nearly totally segregated education; white flight from the Muir attendance area would be exacerbated, the facilities and faculty at Muir would decline.

Many parents felt that something had to be done about the Board's persistent movement of one white neighborhood after another from integrated attendance areas. The parents would have to get together and make their feelings known.

The first meetings of parents who wanted to "save" Muir High School were held that same year.[43] The same process of organizing was catalyzed by the 1967 debate and movement over Plan A, a plan to take two all-white elementary schools out of the Pasadena High School attendance zone and put them back into the Muir High School area. In May 1967, the Board voted to support Plan A, returning the two schools to the Muir attendance area; later that year, after an election conducted largely around this issue and with two new members, the Board rescinded the decision.[44]
The The group of concerned parents which had been working together for nearly two years sought a State Court injunction, first from Judge Burton Nobel, then from Judge Ralph Nutter, which would have forced the Board to reinstate Plan A. The first judge refused to allow the case to proceed;[45] the second told the parents to give the new Board a year to "get settled in,"[46] but he nevertheless " . . . laid down a clear warning, a clear mandate to /the/ Board to act. . . ."[47] The Board didn't do anything new.

And for good reason: The Board felt it was on solid ground. From 1963 to 1967, the Los Angeles County Counsel advised the Board that no action based on racial considerations was constitutional, including, of course, actions which would explicitly promote racial intermixing.[48]

By 1968, two simultaneous events were taking place. The Department of Health, Education, and Welfare was scrutinizing the Pasadena Unified School

District as part of an investigation of several northern school districts. The investigators were impressed by a series of statistics compiled by a statistician-parent[49] who had monitored what administration officials told the Board. The HEW investigators eventually advised the Justice Department that possible violations of the law were occurring in Pasadena.[50]

At the same time, the Spanglers and other Muir parents, unhappy with their lack of success in the State courts, brought their complaint to federal court. The parents filed suit on August 18, 1968,[51] asking for desegregation of the high schools only. The parents hoped to obtain an integrated high school education for their children. For both black and white parents, "integrated" meant "not majority black."

James and Bobbie Spangler, parents of the named plaintiff, suggested that a whole array of strategic reasons induced them to seek relief only at the high school level. First, much of the financial support behind the suit came from the Linda Vista elementary school area, where affluent white parents were willing to help finance a court battle which might result in their children's future high school (Muir) being maintained as a majority white school. If the suit sought to desegregate all levels of the system, these funds would have dried up, since most white parents liked their young children attending an all-white elementary school.[52] Additionally, the increased expense of additional research and preparation for a system-wide suit argued in support of the "high schools only" approach.

Second, the idea of busing elementary school youngsters was sure to arouse the white community's ire, and, while political support was not crucial in the case-making stage, it certainly would be in the implementation stage. If the parents were to gain an implementable decision for

for their children, they could not afford to "take on" the entire city, more than half of which consisted of all-white elementary school areas. Why upset the entire city when the real goal was to keep Muir from "going black"?[53]

Several observers argue that there was another reason for the suit: Desegregation-integration was seen as intrinsically good. It was what justice required and it would improve every student's education.[54]

A more cynical assessment of the parents' motivation can be made, too. While promoting integration had limited public support, stopping deterioration of the community had substantial support. A housing value shockwave effect had been emanating from the northwest corner of Pasadena, reducing property values throughout the city in ever-expanding rings as the black "ghetto" grew. Pasadena is a small town; housing is in short supply. If all high school students attended integrated schools, the value of white residences nearest to the black community would not be depressed inordinately. Conservation of housing values, it is argued, was a major, if unexpressed, reason for the filing of the suit.[55]

At the same time as they filed their suit in federal court, the parents petitioned the Department of Justice to enter the trial as plaintiff-intervenor. It was important for the parents to get the government involved: The tremendous cost of researching and preparing the case simply would have been too great for the private plaintiffs to bear. While the government could have brought the suit without the private plaintiffs, the plaintiffs would have had a most difficult time making, let alone proving, their case without the government's involvement.

What actually induced Justice to intervene remains unclear, but it is not likely that the petition of the plaintiffs had a major impact on the decision. A more important consideration may have been HEW's concern over possible violations uncovered in its investigation.[56] Whatever the reason, late in 1968, the Justice Department petitioned to intervene in the case.

The Justice Department moved to expand the suit so that the entire school system, not just the high schools, might be desegregated. Judge Real granted the motion to intervene, but denied the motion to amend. According to Charles Quintance, principal attorney for the government at the 1970 trial, this initially conservative decision reflects nothing about Judge Real's notions on desegregation. Rather, it illustrates his notion of intervention: When you move to intervene in a case, you take the case as it is.[57] The government appealed Real's decision and, on August 28, 1969, the Ninth Circuit Court of Appeals reversed Judge Real and remanded the case with instructions to reinstate the stricken allegations.[58]

THE JUDGE

Some lawyers assert that federal courts are like small fiefdoms with a judge as feudal lord.[59] Judge Real may not see himself as a monarch, but he commands fiercely the judicial process in his court, preferring the role of catalyst to that of referee. The range of phrases associated with Judge Real is vast, starting at "a thoroughness for details,"[60] continuing through "searching for the truth," "concerned" and "caustic,"[61] and ending with "screaming monarchical idiot."[62] He is considered "a very brilliant man,"[63] even by those who do not like his judicial deciaions. Others see his desire to get to the truth pushing him beyond the limits of reasonable courtroom behavior, carrying him to be "rude,"[64] "arrogant,"[65] "sarcastic."[66] One partisan observer who had not been happy with the outcome of the Spangler case said that Judge "Real is prosecutor, attorney, judge and hangman. (He does not let people speak.) He can't seem to be fair."[67]

Judge Real has his own explanation for his "search for truth" style, and it is bound deeply in his understanding of the role of a judge. The function of a judge is, one, always to sit as a procedural umpire and, two, sometimes to make sure that the facts are presented. The first function--"umpiring"--characterizes the judge's role in a jury trial, where facts are to be resolved by the jury and the judge's role is solely to distinguish and rule on points of law. The second function--ensuring that all facts are presented--must be added to the first in any court action where the judge is expected to examine and understand the facts as well as to interpret the law.[68] Thus, in the Spangler case, Judge Real was required to understand fully the nature of the Pasadena Unified School District, its Board, administration, parents and students over some 25 years. Hence, Real's question-asking role is derived directly from his conception of the judge's office.

Manuel L. Real is a "take-charge" judge.[69] He refuses to see time wasted in his courtroom and is not at all gentle in reminding counsel that neither verbosity nor redundancy impress him. Frequently, he will respond directly to a question from counsel, preventing a witness from answering, if the answer has already been offered to the court in the form of an exhibit or as testimony. On the first day of the 1970 Spangler trial, for example, Mr. Quaintance, attorney for the government, requested a witness, a teacher named Mrs. Bigby, to read into the record a particular enrollment figure for the school at which she taught.

By Mr. Quaintance:

> Q. Showing you 1-B, particularly page 4 thereof, under Field Elementary School, would you read the enrollment, the number of Caucasian students, Negro students, and other students as of October 1966?
>
> A. For Field?
>
> Q. Yes.

The Court:

> Mr. Quaintance, Mrs. Bigby is well qualified to read, and I learned to read much longer /ago/ than I would like to remember, so that I don't like witnesses to read to the Court any document which is in evidence.

Mr. Quaintance:

> All right, your Honor.

The Court:

> I will just read it myself.[70]

Simlarly, Judge Real is inclined to save time by telling a lawyer what has just been said by a witness rather than by having a the court reporter read the testimony from the transcript. On the first day of trial, January 6, 1970, the School Board's attorney, John Pollock, objected to a question, asserting it called for hearsay testimony from the witness. Judge Real overroled the objection, but granted Pollock the opportunity to explain his objection.

Mr. Pollock:

> Our objection is on the ground that what this person did may be of importance. The conversations or the instructions or whatever hearsay may be involved in it is not of importance, and this is a back-door way of getting into the record hearsay.

The Court:

> No. All she testified is what she did or didn't do.

Mr. Pollock:

> The question is broader than that, if the Court please.
> May I have the question read?

The Court:

> As the result of the discussions, did she make any application to to Pasadena? The answer was "no." The objection is overruled.[71]

Judge Real sees his own desire to save time as a question of practicality. The federal courts are hearing more and more cases each year. Why not let those who should care the most--the litigants--do more of the work work? Accordingly, he requested Charles Quaintance, principal government attorney in the 1970 trial, to prepare the Findings of Fact and Conclusions of Law for his decision.[72] The reasoning is simple: A victorious litigant will prepare a set of Findings and Conclusions as complete as or more complete than any set which a judge's law clerk might compile. Given the large number of cases now heard in federal courts, it is impossible for the clerks and/or judge to prepare satisfactory Opinions, Findings, and Conclusions for every case heard.[73]

The case itself was tried at a rapid clip. Some 30 witnesses were examined and literally hundreds of exhibits were entered in only nine days of trial. Days were usually long, starting at 9:30 a.m., ending between 5:30 and 6:30 p.m.[74] The defendant's lawyers had thought the trial would last for some six months,[75] but from start to finish, the trial spanned only two weeks, January 6-20, 1970.[76]

One factor which contributed to the speed of the trial was that Judge Real had done his homework. He had studied the pretrial documents thoroughly and, by the time the trial opened, was well-versed in the particulars of Pasadena's geography, demography, and history. During the trial, he cited page numbers and facts from the various pretrial documents and exhibits. In one instance, the government's lawyer was examining a witness:

> Mr. Quaintance:
>
> > Mrs. Foster, what is the predominant race of students at McKinley Junior High School?
>
> The Court:
>
> > White, 57 percent.[77]

Real was sharp. He had read the materials and he was eager to work.[78]

THE 1970 TRIAL

The case against the School Board was presented by the government, the private plaintiffs adding color, but little substance to the trial record. The government's resources were immense: five Justice Department lawyers, one United States Attorney, three legal assistants, and one or or two legal secretaries, all worked to compile and present the government's case.[79] Two of the lawyers, one of them Charles Quaintance, worked full time for over a year on the case.[80] And the government also had the benefit of the research already completed by HEW.

The government's case was a straightforward one: The actions and inactions of the Board over some 20 years were presented in detail. The government attorneys were well prepared: They knew what they wanted from the evidence and witnesses and they used both effectively and comprehensively.[81]

Personal testimony was given, black teachers, for example, detailing the abuse they had received within the District. A sad example of hiring discrimination was revealed in the testimony of Mrs. Barbara Rigby, a black elementary school teacher who was interviewed by a white principal for a job at a mostly white school.

> He said that I was very, very qualified, but that I had to remember that he was a new teacher, I mean principal, this was his first year, and that he had to think about his community and his teachers, and the parents and children at that school. He kept saying that it wasn't up to him to hire me, but it was up to the Board.[82]

Tesimony such as Mrs. Rigby's was supplemented by a historical review which which presented the evolution of the student bodies in all of the District's schools over some 20 years. Little was left untouched: hiring and promotion policies, transfer plans, residential discrimination, all were detailed by the plaintiff-intervenor and all led to the same basic conclusion. Segregation existed in the Pasadena Unified School District.

During the government's presentation, Judge Real's main role was fairly routine: If objections were raised by defense counsel, he wither sustained or overruled them. Infrequently, he questioned a witness to draw out some information he wanted; not infrequently, he reminded counsel for the government that witnesses can read and that so can the Court, that an assertion already in the written record need not be presented orally.

John Pollock, attorney for the School Board, initially was well received by Judge Real. Pollock had been hired by the School Board because the county counsel had advised the use of outside counsel. The

County Counsel's Office felt it could not adequately prepare the case and that the District's money would be well spent in hiring private attorneys. In John Pollock, the Board found an intelligent and versatile trial lawyer. Pollock has a gift for detail, points of law, and procedure. His objections were sustained more often than not. He presented a clear, if unsuccessful, defense of the Board and its policies.

Pollock's strategy was two-fold. First, he sought to demonstrate that the history of the Board's actions was evidence of, at the very least, an intermittent concern for integration. Second, he suggested that demographic changes and legal prohibitions beyond the control of the Board constituted the major forces which had created the present situation in Pasadena. He argued that any segregation in Pasadena was not of the de jure sort.[83] If it existed at all, it was not be design, but by circumstance, which no Board can be expected to control or required to remedy. If de facto segregation existed, it was not the Board's constituitonal duty to correct it.

Pollock questioned a variety of witnesses--Board members, former Board members, administrators--in his attempt to demonstrate the Board's past concern for and involvement in promoting integration. One major figure was Steve Salesian, a member of the Board from 1957 to 1969, four times Board president.[84] That he had been on the Board during the 12 years before the trial meant he could provide critical information about the Board and its motivation.

Pollock was most thorough in his examination of Mr. Salasian, scrutinizing detail after detail of the former Board member's actions during the 1957-1969 period. Every major action which affected the District's white/black ratio or a particular school's attendance zone, from the La Canada withdrawal to the building of a third high school to the vote on Plan A, was discussed in terms of Salesian and his motivations toward racial or ethnic goals.

The La Canada withdrawal formed the basis for a long interchange between Pollock and Salesian. La Canada's departure, in a three year-long transition period, was going to reduce by about 1,000 the number of whites at Muir High School.[85] In responding to questons from Pollock, Salesian outlined what the Board did to deal with the difficulty:

> Q:
>
> Commencing with that occasion would you tell us what steps the Pasadena Board of Education took while you were on it?
>
> A:
>
> With regard to improving the racial balance at the Pasadena School system?
>
> Q:
>
> Let's start with the high schools first.
>
> A:
>
> All right. The first step was to move other white population into John Muir. Number one, Linda Vista--well, Linda Vista was in there. I think the San Rafael area was moved into John Muir. People from the northeast who were closer to John Muir than they were to Pasadena High School because Pasadena High School was on Colorado and Hill, which is further away from the northeast Altadena area than John Muir. I think they were fed into there. I would say people from the southwest and northeast were sent to John Muir. I would say they were predominantly white students. That was the first thing.[86]

Pollock left nothing to chance. All conclusions would be clearly drawn out for the Court.

> Q:
>
> All right. And that did have the effect, then, of offsetting to some extent the withdrawal of the La Canada students?
>
> A:
>
> Yes.
>
> Q:
>
> Both as to numbers and as to racial composition?
>
> A:
>
> Yes.[87]

Still, Pollock tried to milk the most out of this witness's testimony. Shortly thereafter, Salesian continued.

> A:
>
> I was very disturbed about the La Canada situation, and I knew what it would eventually do to our system--to the school on the westside when that many pulled out.
>
> Q:
>
> And so that you had racial considerations in mind in making these new areas filter into Muir, is that correct?
>
> A:
>
> Yes.
>
> Q:
>
> What was the position of the other Board members in that regard?
>
> A:
>
> I think all were favorable. I think these decisions were all unanimous.[88]

Judge Real questioned the Board's support for the goal of integration. At one point, defense witness Joseph Zeronian, Administrative Assistant to the Superintendent, was detailing some plans that the District had been considering which would promote integration. Judge Real asked him, "Is there anything new in the 1968 plan that was not available in 1964"? The answer: "No."[89]

From Pollock's point of view, the District's support of integration had at least been intermittent; from Real's, it had been non-existent. In a 1977 interview, Real reflected upon the conflict he saw between what the District said it did and what it actually did. Pollock, he reasoned, had a full opportunity to show that "there were reasons why they did what they did."[90] It all came down to one question: "Do /the Board's/ actions belie the words"?[91]

Pollock also tried to lay foundation for his second major assertion, that circumstances beyond the Board's control--the La Canada withdrawal at one point, a county counsel's opinion at another--had actually created any elements of segregation found in Pasadena. His questioning of Salesian on the La Canada problem illustrates this effort. Having already described the assignment of the San Rafael area to Muir,[92] Salesian tells the court that the reallocation was not effective for very long because other considerations arose.

A:

> As we went further along, the problems started to increase. It wasn't serious for several years, and then it started to increase, so we started to take more moves. In fact, we had citizens committees appointed at one time. I believe that there was a citizen's committee headed by

> Mr. Al Lowe, present Board member, at which time we had them recommend various plans, and there were two or three plans and one of them was the exchange of 200 black students with 200 white students called Plan B which was ruled illegal by the county counsel stating that you cannot move students by race. It was strictly prohibited.[93]

In other words, the county counsel's ruling had prevented the Board from enacting an integration-promoting plan. Here, as with La Canada's withdrawal from the District, there was simply nothing the Board could do.

Pollock's own concluding remarks best present what he attempted to prove through evidence:

> We are not involved here with a de jure segregation /in/ which, as we know in some instances in other parts of the country, there has been a deliberate and intentional, perhaps even malicious effort to keep separate and segregated the races in the public educational system.
>
> What we have here is a partial de facto segregation. It isn't even a complete de facto segregation. It is a partial de de facto segregation.[94]
>
> And as the evidence produced by the government has shown in connection with residential living patterns and with regard to to the pattern of buying and settling in the Pasadena area, the problem is seated with the residential pattern of Negroes in settling predominantly in the western section of Pasadena.[95]
>
> If there be any quarrels it cannot be with the good faith, it cannot be with the good intentions. It can basically only be with the matter of time. I suggest that even that kind of consideration is one which one forms by hindsight, it did not look slow as it was going on.
>
> I submit to the court that an order which would require the School Board to move forward with all deliberate speed . . . /within a context of court supervision of timetables, proposals, and plans as well as public participation/ . . . is the realistic and practixal and proper way to approach.[96]

Quaintance's conclusions for the government just as aptly present his case.

> Mr. Justice Brennan said that the desirability of developing public support for a plan desired to redress de jure segregation, he is talking about Denver, Colorado, cannot be justification for delay in the implementation of the plan.
>
> We agree with counsel that Pasadena has partial de facto segregation, it has partial de facto and partial de jure segregation. The two simply cannot be separated. How did Cleveland get to have over 600 black students while Linda Vista less than a mile away had less than five. With Linda Vista having a capacity of 250 why did the Board decide to add to the black school and not to the white school? How did Madison get to have a majority black student body except through the quadruple play, or whatever you want to call it, in 1966 with McKinley and Jefferson immediately adjacent to it having 5, 10, 11 percent black student bodies.[97]
>
> We ask one other question, and that is, why has the District since 1954 never once assigned children from a majority white residential area to a majority black school? The reason is race, and Pasadena has both de jure segregation and de facto segregation. The effects of de jure segregation, the seffects of segregation in housing are so pervasive that there is no way to separate them from the de facto elements of segregation in Pasadena.
>
> The only way to overcome the effects of past discrimination in Pasadena is to have a comprehensive integration plan at all levels. This is one nation, we submit, and there just shouldn't be a different rule, there just can't be a different rule in the south and the north. The only rule, and it is the one that applies here and everywhere else, is that there has to be equality.[98]

THE OPINION OF THE COURT

On January 21, 1970, Judge Real issued his decision from the bench without taking even a brief recess following the final arguments of counsel, being his "normal practice" to rule in this manner.[99] Real found it to be a "terrible understatement"[100] that there is racial imbalance in all of the various levels of the Pasadena School system. He acknowledge the

District's allegiance to the concepts of neighborhood schools and no cross-town busing as educational policies which must be employed within constitutional constraints. When " . . . the continuance of those policies results in racial imbalance /in the District's schools, those policies take on/ constitutional proportions. . . ."[101]

On January 22, 1970, Judge Real issued a two-page opinion.[102] His findings were simple: Segregation existed throughout the District and it was the direct result of Board policies in the hiring and promotion of faculty and staff, in the construction of schools, and in the assignment of students. The Board or its agents had hired and promoted on the basis of race; the Board had more than once enlarged schools to keep blacks isolated; the Board had made deliberate decisions which took white children from integrated schools and sent them to white schools. Specifically, the Board had used its policy in support of neighborhood schools and its policy against cross-town busing in such a manner that the result was an ever-increasing racial imbalance.

Some seven years later, Real remembered that the "evidence was fairly overwhelming that, in each case in which the school district had an opportunity to do something about keeping . . . a balance in the schools,"[103] the Board always opted for putting the blacks together.

Judge Real cited Brown and the Fourteenth Amendment as the legal grounds for his decision and, "because time is of the essence in vindicating the rights of Pasadena's children to obtain educational opportunity,"[104] he limited his Findings of Fact and Conclusions of Law to those listed above, though he did propose to issue Supplemental Findings and Conclusions at a later date.

Supplemental Findings of Fact and Conclusions of Law were issued on March 12, 1970,[105] and they reviewed the body of evidence on which the original shorter opinion had been based. The Supplemental Opinion consisted of a meticulous comparison of defendant's espoused beliefs and observed actions as well as a recording of statistics and historical events which demonstrated how the Pasadena School District had evolved over the period from the late 1940s to 1970. The tone of the Supplemental Opinion is objective. It is a rigorous cataloguing of wrongs, a tightly woven demonstration of the need for a remedy from the Court.

An understanding of Judge Real's definition of segregation is extremely important if one is to appreciate his perception of the violations in Pasadena and the remdy required by the Constitution.

> I think in 1954 the Supreme Court in Brown was dealing not with just a multiracial community, but with a multi-racial nation and dealing with segregation. It was the opponent to the concept of integration that gave the adjectives of de facto, de jure, partial or entire.
>
> I think the Supreme Court was dedicated to the principle both educationally and constitutionally that where Negro students had to attend majority Negro schools or all-Negro schools that they were being deprived of an educational opportunity to fulfill all of their dreams, at least in this country.
>
> I think also not only to the Negro community or the minority communities, but to the majority communities they were assigning the question that it is their education that is also being constitutionally affected by either de facto, de jure, partial or entire segregation of any kind.[106]
>
> I think you talk a lot about integration, segregation in terms of words that might have meaning. Integration and segregation and racial imbalance are all the same word.[107]

In a speech given later that same year at San Fernando College, Judge Real stated,

> It doesn't take formal logic but just plain common sense to recognize that separation--whether you call it segregation, racial imbalance, de jure or de facto--must be ended whether you depend on Brown or the inescapable principle that the Constitution requires an equal educational opportunity for all.[108]

Judge Real draws his own "logical conclusions" from this "common sense."

> /W/hatever can be reasonably required to correct segregation must be done. Constitutional principles, if they are to have any meaning--if they are the means of providing the vehicle for social reform--must never be so rigid or so absolute that they preclude a compromise which at some point may be unfair to the participants. I say unfair because desegregation, integration, correction of racial imbalance--or whatever you may wish to call it--is unfair. It is unfair to ask any child --black or white--to give up a neighborhood school concept; it is unfair to ask any child--black or white--to submit to new, strange, and hostile surroundings. But justice requires it.[109]

Judge Real's opinion was far-reaching and immediate in its consequences. He ordered the School Board and all of its agents to cease from discriminating and further ordered the Board "to prepare and adopt a plan to correct racial imbalance at all levels."[110] The plan was to include programs for assignment, hiring, and promotion of teachers and staff, location and construction of facilities, and assignment of students such that racial segregation throughout the District would be reduced. With regard to students specifically, assignments were to be made such that, when school commenced in September of that year, some eight months later, "no school in the District . . . /would have/ a majority of any minority."[111] Last, the Court retined jurisdiction so as to "continue to observe and evaluate the plans and execution of the plans."[112]

COMMUNITY REACTION TO THE DECISION

The Board's desegregation plan was to be submitted to the Court by February 16, about three weeks after the Spangler decision was issued. Real gave the Board only three weeks because he believed that the PUSD was not a large district and that its administrators were aware of its problems and knew what resources were available to remedy those problems.[113]

The District's own Master Planning Committee had been working for several years; in fact, the District had been planning to desegregate the high schools in 1970, the remaining schools in 1971. The "swiftness" of Real's Order, then, should not have been overwhelming. It acted as a catalyst which, by establishing a timetable and a set of decision-making criteria, speeded the realization of plans already being undertaken.

Had the Board not been prepared to desegregate, Real probably would have issued exactly the same Order anyway. Throughout the trial, he made it quite clear that he was not interested in political expediency, that his sole concern was the Constitution and its requirements. Frequently, he would not allow testimony about community attitudes to be entered into the record. When Pollock questioned Joseph Zeronian, a PUSD administrator, about the community, Real sustained a government objection to questions about "a change of attitude" and "a growing up in the community."[114] After a discussion of white flight and the need for "easing" into integration, Judge Real said, "I don't know that the performance of constitutional duty has anything to do with public acceptance . . . . I have a constitutional duty to decide cases not the way people want them, but the way I feel is proper to decide them."[115] The political expediency of catering to community attitudes had no basis in the Constitution.

Still, Judge Real was a realist. He wanted to be sure that the District could afford to implement any Order he might issue. He expressed this concern in several ways, most notably from the bench during the discussion of a bond authorization referendum, the results of which were being tested in another court. In a later comment from the bench, Real demonstrated convincingly that he understood the political and economic realities of a desegregation order. Board member Al Lowe was testifying about his commitment to community involvement in the implementation of any integration plans. "It leads to a better feeling. We need to go out to all parts of the community and tell them why it's valuable."[116] Pollock asked Lowe why he felt this way. Before he could answer, Real interrupted: "Don't belabor the obvious, Mr. Pollock. You've got to make people happy or they won't give you any money."[117]

Regardless of the political and financial questions, in issuing his Order, the judge expected compliance. The decision had been "constitutionally-determined and /the/remedy prescribed."[118] Real believes that a judge has to take the attitude that his decision is right and will be accepted by the parties.[119] Although both the government and school board suggested possible reporting mechanisms for monitoring implementation of the plan,[120] Judge Real said that regular reports were not necessary. "I am not a policeman and I don't intend to act, would be like a policeman."[121] Judge Real said that regular reports to the Court would be unnecessary. If the Board or the State felt that the plan was not accomplishing its purposes or that it should be changed, the matter could be brought before the Court for review. This mechanism of insuring compliance places the onus of aciton on the interested parties. thus eliminating unnecessary and expensive court involvement, a continuing concern of Judge Real.

The Judge expressed some interest in allowing the Board to proceed on its own, saying that " . . . the Court may have found it possible to take the broad approach of deliberate speed"[122] from Brown, but, recognizing the vagaries of political life, that "we cannot guarantee that the . . . present majority of the Board will remain the majority of the Board,"[123] he found a timetable to be necessary. "I am sure that in retrospect that al all the country has recognized the mistake of that small phrase, 'with deliberate speed'."[124] "With deliberate speed" implies good faith on the part of the Board, and Quaintance, in his locing remarks, quoted a Ninth Circuit opinion which stated that ". . . good faith is not the standard. Good faith is relevant only as a necessary ingredient of an acceptable desegregation plan. We expect and we require not only good faith but positive action."[125] Real did not doubt the good faith of the Board then in power. What he wanted was to ensure action.

Reaction to the decision came quickly and in a variety of forms. The Pasadena Star-News, the major newspaper in the city, initially supported the decision. On January 22, it featured an editorial entitled, What the Judge Meant."

> In many ways Judge Real did a great favor for all of the school district. He settled an issue that has burned too long. . . . The Board now has the force of law behind it to do immediately what it has bee been doing somewhat hesitantly in the face of public opinion.[126]

The editorial went on to argue against appealing the decision. As it turned out, the Star-News' support of the decision was short-lived. The author of the ditorial was promoted out of the business when the managing editor returned from a vacation from Europe![127]

Also on January 22, a special Board of Education meeting had been scheduled at McKinley Auditorium to discuss pending plans for the high schools; many in attendance preferred to discuss the desegregation order. The various viewpoints in the community were represented. "Some speakers praised the Judge's decision; some called for an appeal."[128] In front of the building, a car was parked with signs on it urging "silent majority, speak up, appeal," and giving a telephone number for those interested in joining together to urge the Board to appeal.[129]

A week later the Board voted 3-2 not to appeal. One of the three, Mrs. LuVerne LaMotte, a long-time member of the Board, refused to support the motion because there was "a very slim chance for a successful appeal."[130] According to Joseph Zeronian, the Board's lawyers had privately advised that the chances for a successful appeal were "less than 50 percent."[131] All of the Board members had sworn in their courtroom testimony that they supported the policy of integration and therefore, she argued, the District was in "a poor position to appeal."[132] Furthermore, an appeal would lengthen the time that the District and the community would be faced with the problem of redistricting.[133]

Another major argument, aginst filing an appeal was presented by Dr. Engholm, the second of the three Board members who voted against the appeal. His concern was the expense of another court battle, both in lawyers' fees and staff time. Dr. Engholm said that the School District had already spend $53,000 in attorney's fees and $100,000 plus $150,000 in staff time. He added, "We can't go on spending that kind of money."[134]

A third reason the Board majority voted against the appeal may have been that it wanted to be forced by the courts to integrate.[135] This way the political flak would be absorbed by the Court, not the Board.[136] Though, for obvious reasons, none of the Board members admitted to this motivation at the time, this interpretation of their motive for not appealing may have some validity.

Both of the members who supported the appeal argued that County Counsel rather than private counsel could handle the appeal, thus eliminating part of the cost.[137] One man stated to the Board that "Nobody is going to bus my child out of the area no matter what the ethnic balance." He went on, saying, "I don't care how many children you put into my child's school, but nobody is going to bus my child out of his neighborhood."[138] Nonetheless, the Board voted 3-2 not to appeal.

Immediately after the vote, one of the Board members who had pushed for the appeal resigned. He stated another concern of opponents to the Spangler decision.

> In my opinion we are today witness to the beginning of the end of local control, and under these conditions of Federal mandate where local officials duly elected and responsible, are not allowed to function, conditions where those closest to the scene are not allowed to prevail and solve their own problems, I find it difficult to serve.[139]

The symbolic effect of his resignation was only frosting on the cake; the vote itself had been objectionable enough and the response to it was immediate. In less than two weeks, the Board received a petition signed by 516 Pasadenans who declared they were "extremely concerned over and strenuously /opposed/ to the prospect of student busing in our community because of its social experiment nature, inconvenience to all, detriment to the students and burdensome cost."[140] A group of parents who hoped to intervene and appeal the case formed the Pasadena Appeal Committee and engaged the services of an attorney.

The Pasadena Appeal Committee consisted of a group of disgruntled white parents. Their leader was Henry Marcheschi,[141] an articulate exponent of their cause who later spearheaded the "conservative take-over of the Board," an effort which spanned three years and two separate School Board elections and which, by 1973, had placed four like-minded individuals on the Board.

The PAC was formed because a number of parents felt that their concerns had not been addressed adequately by the Board. Some of their m motivation may have come from simple racism. More respectably, they felt that a District could not "correct de facto segregation by using /the/ schools as a social tool."[142] They were also worried about possible reductions in property values and the problem of white flight which might result from the desegregation Order.

That "white flight" had already been occurring in Pasadena was not well recognized at the time. Lynn Vernon, a parent then active in the PTA and a statistician by trade, had compiled statistics on ethnic trends in the District. According to her, white enrollment in the elementary schools had been going down throughout the 1960s.[143] Another expert on the subject, Ted Neff of the Bureau of Intergroup Relations, computed that from 1966-1969, the average decrease in whites at the elementary level was 2.28 percent; from 1969-1975, it was 3.21 percent.[144]

The PAC's lawyer, Lee G. Paul, who, when PAC sympathizers later gained control of the Board became the Board's lawyer,[145] petitioned Judge Real for the right to intervene so as to appeal the decision to a higher court. Judge Real denied the PAC's motion to intervene.[146] He reasoned that the parents were represented by the Board and that the proper way to change the Board's actions was through the ballot box, not through an after-the-decision-has-been-made motion to intervene.[147] The PAC simply tried to come in too late.[148] The parents failed in a later attempt to obtain a reversal of this decision from the Appellate Court.[149] The Order of January 20, 1970, tood. In the meantime, the District had drawn up a desegregation plan.

THE PASADENA PLAN

Real's guidelines for a plan were broad, the standard of "no majority of any minority" allowing the District quite a bit of leeway in its allocation of students to the various schools. The "no majority of any minority" standard was Real's own invention, designed to work permanently in a demographically changing town.[150] The standard clearly prohibited any school from having more than 49 percent of any minority group. If whites constituted a minority in the District, the standard would still apply and their attendance at any school would be limited to 49 percent of the student body. On the other hand, the standard did not automatically require schools in which the District's majority race was a majority to be adjusted. Rather, movements of pupils could be decided at the discretion of the Board, so long as no school had a majority of any minority.

One explanation for why Real imposed this standard comes from the fact that, in Pasadena, any school with a majority of black students was thought of as a black school. To eliminate this stigma, to promote the existence of "not white schools, not black schools, just schools," and thus to ensure racial intermixing at every school was the goal of the standard.[151]

Catering to the white community as far as possible seems to be evidenced in the Pasadena Plan's design. For example, the policy of assigning children to one neighborhood K-6 elementary school throughout the first seven years of public education was abandoned when the plan was designed. Instead, the Pasadena Plan called for the creation of a two-tiered primary educaton which required each student to attend two schools, one for the primary years (K-3), another for the elementary years (4-6). As part of this change, new transportation systems and attendance patterns were [illegible] devised: some schools could be within walking distance while others could only be within busing distance.

There were some legitimate reasons for [illegible] [illegible] parents could have three or four teachers from which to select their child's teacher for the coming year. Also, it was thought to be a "growing experience" for children both to walk for part of their elementary school career and to ride the bus for part of it.[152] Nonetheless, a subtle political buy-off was probably taking place: twelve of the fourteen K-3 schools were in white neighborhoods, [illegible] white children closer to home.

In all, the Plan reveals a commitment to satisfy the [illegible] of Judge Real's Order. All of the components are there: elementary school redistricting which established four east-west districts to ensure that well-integrated student bodies could be formed; redesign of the junior high attendance areas and a new allocation of grade levels to create four seventh and eighth grade and all ninth grade schools; and, a short and long-term reorganization plan for the high schools which called for "ethnically-balanced"[153] incoming tenth grade classes at each school and the eventual formation of a three high school educational park. Additionally, provisions were made for satisfactory hiring and promotion procedures, as well as for the recruitment and assignment of personnel in an "affirmative action" manner.

One line from the introductio of the Plan is especially significant: "The changes /in staff hiring, student assignment and building construction policies/ will not only facilitate integration, but will move the District in the direction of greater quality education."[154] This goal was the School District's own, for Judge Real had specified no strictly pedagogical goals. He felt that his function as a judge did not require him to be concerned with the educational aspects of the plan.[155] Rather, he trusted the School Board to continue in its efforts to educate its children.[156] Given expert testimony which essentially said, "integration is better for kids than segregation," he felt comfortable doing his part of the task at hand--ordering desegregation--while leaving the Board to do its part--providing education.[157]

Implementation of the Plan was left entirely to the Board. Judge Real had no contact with either the Board or the administration between the time he approved the Plan in 1970 and the time the Board petitioned his court in 1974.[158]

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THE FIRST YEAR

In the Spring of 1970, many organizations began work to prepare the community--parents, students, and teachers alike--for the coming school year.

> The League of Women Voters manned an Information Center at the Education Center on a daily basis from May through September.
>
> TPA units sponsored social events, so that parents whose children were assigned to the same school could meet and get to know one another.
>
> SERVE (Serving Effectively Through Volunteer Resource Effort) volunteers and PTA members recruited and trained transportation aides and bus stop volunteers.
>
> Representatives of law enforcement agencies provided counsel and traffic control information.
>
> The Automobile Club of Southern California donated leaflets and cards on bus transportation and standards of behavior for all students who are bused.
>
> Parents were informed of the Pasadena Plan and given progress reports on its implementation through mailings to every home, newspaper and television coverage, and through the Information Center.
>
> Information booths were set up at 23 different locations throughout the city to answer questons and provide information about the Plan.[159]

Parents were bused with their children to newly-assigned schools. Principals and teachers were available for consultation, and the classrooms were open so that children and parents could visit their new teachers informally.[160]

When school opened, hundreds of parents rode the buses, accompanying children to their new schools in different parts of town.[161]

The first year of the Pasadena Plan was "a very exciting time within the schools."[162] The Plan, though it did not call for explicitly pedagogical improvements,[163] sparked other kinds of change in the District. During the summer of 1970, staff development workshops were held for administrators, teachers, and aides. These workshops focused on innovative teaching techniques, cultural awareness, and individualized instruction. A total of 1,092 people participated.[164]

A "demonstration teacher" program was established which allowed teachers "to be released from classroom responsibilities to observe exemplary classroom/s/" in which achievement differences have been successfully accommodated.[165] Cooperative arrangements between some elementary schools and neighboring high schools were made in which high school students received academic credit for working with elementary school children.[166]

Most teachers and administrators supported the Plan.[167] The business community, too, initially supported the Plan, and the Chamber of Commerce did so quite visibly.[168] Nonetheless, a variety of problems arose.

Initial school assignments were decided by a committee of the District's principals. While they may have known a lot about education, their knowledge of sociology was lacking. In at least one school, LIncoln Avenue Elementary School, high socioeconomic white children were mixed with low socioeconomic black children and the result was a chaotic and unpleasant learning environment. Teachers were not adequately trained to handle their newly and swiftly integrated classrooms. Discipline problems existed and charges of prejudicial treatment in disciplinary actions were made. Some racial conflicts occurred, especially in the seventh grade, an especially volatile year in any event.[169]

Sadly, safety and security took priority over education and desegregation. "An incident was /seen as/ as major problem,"[170] and "dealing with incidents, both real and rumored,"[171] cut into administrative time which should have been spent promoting education.[172]

POLITICS IN PASADENA

Shortly after school began, a recall drive was organized by the Pasadena Appeal Committee. A recall election was held which challenged all three Board members who had voted against the appeal. The election was close, but an overwhelming turnout in the black community teamed with support from white backers of the Plan and the town's natural reticence to vote for any recall barely saved the three members' seats.[173]

Had Judge Real's decision come not in January of 1970, but in January of 1971, just before a regular odd-year election, the Board would have been swept out of office.[174] Given Pasadena's conservative populace and its "patriotic" support for office holders in general, many people who would have liked to have seen the three Board members ousted simply couldn't bring themselves to support the recall. Nonetheless, the leading opposition candidate, PAC Chairman, Henry Marcheschi, began to gain the attention of the city.

In the 1971 school board election, busing opponent, Henry Marcheschi was elected, His major arguments were that Real's Order should have been appealed, that discipline must be restored to the classroom, and that the costs of busing must be reduced, if not eliminated. While Marcheschi's arrival to the Board did not tip the liberal-conservative balance, it did bring a most articulate spokesperson into the public eye. Marcheschi was a far more astute politician than his fellow Board members. While the other Board members talked primarily about fairly non-controversial issues, various education reforms, for example, Marcheschi harped on what he saw as the weaknesses of the Pasadena Plan: It was a financial burden; it caused a decline in academic performance; it was inconvenient. He argued that magnet schools should replace forced busing and that the 1970 Order of the Court must be vacated.

In October of 1971, he presented to the Board a critique of the Pasadena Plan and proposed the adoption of a different plan.[175] In November, the Board heard statements from twenty-eight community members on the Marcheschi proposal. In December, when Marcheschi moved that his recommendation be approved, the proposed alternative died for lack of a second.[176]

From 1970 to 1973, opposition to the Pasadena Plan and the Board's support of it grew. Gene (sic) Wiber, a leading proponent of the "stop forced busing" movement in Pasadena, suggests several reasons for the growth of this opposition.[177] First of all, federal "control" over local issues became increasingly difficult to tolerate. The "American people have never acclimated themselves to be forced /by their government to do anything which they felt unjustly imposed on their rights/."[178] "God gave us our children to raise as we see fit."[179] Another less philosophical reason for the increased opposition to the Plan, she argues, is that parents fear for their children's safety. "Mothers like to know what their children are doing."[180] Some incidents of racial violence and intimidation of whites by blacks verified white suspicions about the whole notion of desegregation. They saw their children being taken out of their parents' control and used as a "social experiment."[181] Furthermore, some white parents feared that their children would not be challenged academically, that classes would be slowed down to accommodate the needs of the black children and that, as a result, white students would be bored and would not develop to their full potential.

There may have been some basis to this last fear, because both administrators and teachers fell into the trap of "lowered expectations," not expecting (and therefore not getting) quality performances from students. The District staff caught itself and its students in a vicious circle of lowered expectations and poor performances. Ray Cortines, Superintendent of the District since 1972, considers this problem of lowered expectation to be one of the major causes of ill will toward the Plan and the major cause of the decline in student performances.[182]

All of these factors combined with a perceived loss of business and a resultant change in the attitude of merchants, and a change in the editorial policy of the Star-News, to fortify the conservative forces in their opposition to the Pasadena Plan.

The conservative bid in the April, 1973, School Board election was ably captained by the politically astute Gene Wiberg. Her efforts helped put into office three new antibusing Board members, Richard Vetterli, Henry Myers, and Lyman Newton. Their platform was simple: We will stop forced busing; we will try to get rid of the court Order; we will restore discipline;

we will reinstitute quality education, replacing fuzzy liberal teaching with a more fundamental education; we will cut costs.

Some portions of their Statements of Qualification, as filed with the Registrar of Voters, illustrate their attitudes, concerns, and proposed solutions. Dr. Richard Vetterli's platform urged the District to:

> End Forced Bussing. The present "Pasadena Plan is responsible for white families leaving the school district. This destroys our tax base, our schools and our community.
>
> Promote Fiscal Responsibility. Funds can be better spent by concentrating on education rather than wasteful social experiments and inflated administrative and busing costs.
>
> Return to Constructive Discipline on Our Campuses. Children can not learn in an atmosphere of fear and i intimidation. Safety of students is primary.
>
> Return to Basic Education. . . Our children are being cheated. Our once-fine school district has become an academic disgrace.[183]

Both Dr. Henry Myers and Lyman Newton, the other two conservatives elected in 1973 also rang the forced busing bell, Myers' statement testifying well to his beliefs. "FORCED BUSING has been a total failure. It is seriously harming both our educational system and race relations. It should be eliminated as rapidly as possible."[184] Newton pledged to eliminate forced busing, "thereby reuniting the neighborhood and consequently the city."[185]

Pasadena voters were moved by fear and scare tactics,[186] and by promises of a return to the pre-busing status quo. Federal intervention would (somehow) be eliminated; the social experiment of disrupting neighborhoods would be ended.

The outcome of the election signaled not so much a change in belief as a realignment of power. The city divided on either side of Lake Street, the north-south divider to the east of which was lily-white, to the west of which was integrated or black. When all three candidates were elected, they joined Marcheschi on the Board, forming a very comfortable majority which could make school policy as it pleased. Ironically, it was in 1973 that the academic achievement of Pasadena's students began to increase for the first time since the Plan had been implemented.

THE 1974 TRIAL

Early in 1974, the new Board appeared in Judge Real's courtroom to move that the desegregation Order be vacated.[187] Judge Real was, as one lawyer put it, "shocked at the audacity"[188] of the Board in coming before him to seek a vacate order. He was not pleased, to say the least, that his original Order was being questioned.

In returning to Judge Real's Court, the Board sought four things: (1) relief from the original order, (2) dissolution of the "no majority of any minority" injunction, (3) termination of the Court's jurisdiction, or alternatively, (4) modification of the original plan.[189] It offered to create four racially-balanced attendance zones in which parents could send their children to any school. Magnet schools would be created within each zone around various themes. If segregation continued, minority and white children would be brought together for a half day each week for special programs.[190]

In his operning speech, Lee G. Paul of the prestigious law firm Paul, Hastings, and Janofsky, as attorney for the Board, presented to the Court a stipulation which was "designed to speed these proceedings."[191] He explained the contents of the stiuplation:

> Your Honor will note that Point 1 of the stipulation covers the right for us to proceed in the case without objection as to jurisdiction. Point 2, that the Pasadena Plan as implemented pursuant to the Order of the Court has in fact been implemented. And third, that all parties on the basis of the discovery conducted as of the 23 of February are aware of no violations of the Pasadena Plan up to and including the present, save that it is the contention of the plaintiffs as distinguished from the Government that the appointment of two assistant superintendents and the director of elementary curriculum on July 10, 1973, the appointment of principals of Wilson and the fundamental schools on July 31, 1973, and the failure of the Board to have a Black Task Force and the Mexican-American Task Force for the school year 1973-74 as well as the establishment of the fundamental school, that these actions on the part of the Board the plaintiffs reserve as a basis /for charging violation of the Court's Order/.
>
> On the basis of that stipulation, your Honor, it is the judgment of the parties to the case, at least subject to the views of the Court, of course, that there has been and is now full compliance with the Order of the Court.[192]

Additionally, Paul submitted to the Court a modified desegregation plan which included magnet schools as its major component.[193]

The most important phrase in Paul's opening remarks was "subject to the views of the Court," because the evidence presented did not convince Judge Real, and it didn't matter what the School Board--or the Justice Department, for that matter--was willing to stipulate. (It is interesting to note that this decision runs counter to Judge Real's usual reliance on the litigants fending for themselves in any particular action. Here, he chose to demand a greater demonstration of compliance.)

Two of the School Board's major witnesses were outside experts David Armor and Robert Dilworth. Armor testified about academic performance within the district; Dilworth about the phenomenon of "white flight."

One of the Board's main arguments was that it did not have enough leeway to accomplish high educational goals, that the Pasadena Plan denied the children of the District a good education.

Armor was on the witness stand. He had been called to interpret statistical reports on academic achievement within the District during the four years the Pasadena Plan had been in effect. The Board's contentions about academic performance were based on this testimony, and Real wanted more details on how statistics could be interpreted to tell why things happened.

> THE COURT:
>
> Did you make any analysis or any study of the curriculum that was offered these students in these four years and the changes that were made?
>
> THE WITNESS:
>
> No, sir.
>
> THE COURT:
>
> Would that be something you would consider in terms of making determinations as to what the effects of anything are on the achievement of students?
>
> THE WITNESS:
>
> Not the effects of desegregation, sir.
>
> THE COURT:
>
> No, but teaching has an effect on the achievement of students, doesn't it?
>
> THE WITNESS:
>
> Well, there is some controversy on that point.
>
> THE COURT:
>
> You mean teaching has no effect on the achievement of students?

THE WITNESS:

On the relative achievement of students there is some controversy if teaching can change the relative differences among groups of students.

THE COURT:

In other words, there is no such thing as quality education, is that right? There is just education?

THE WITNESS:

The difference between learning as opposed to the rates of learning in different groups.

THE COURT:

A teacher has no effect on that?

THE WITNESS:

A teacher has an effect on the rate of learning.

THE COURT:

And that is measured how?

THE WITNESS:

Achievement tests are one way of measuring that.

THE COURT:

Of the rate of learning?

THE WITNESS:

Yes.

THE COURT:

And the teacher has an effect on that?

THE WITNESS:

Yes.

THE COURT:

You did not make that study in Pasadena?

THE WITNESS:

I did not study teacher diffe-ences for black and white students, no.

THE COURT:

All right, counsel. Do you want me to buy half of it now? Is it half of the pig you want me to buy?

MR. LANE:

Your Honor, we are trying to present the facts Dr. Armor has.

THE COURT:

I understand, but the question is the competency of the testimony has to do with the ability to make the measurement that you are asking him to conclude.

THE WITNESS:

May I offer just one observation?

THE COURT:

Certainly.

THE WITNESS:

The hypothesis that I am testing is that in these charts is that desegregation, the mixing of students in a school has an effect upon achievement in the school.

THE COURT:

Well . . .

THE WITNESS:

Not what other things affect achievement of which there are a great meany.

THE COURT:

Dr. Armor, how could you measure that if you haven't taken into account all of the factors which go into achievement?

THE WITNESS:

The students in 1969, those scores reflect a segregated situation. The scores three years after that reflect a desegregated situation. I am only testing the change or effect of desegregation on changing minority student performance.

THE COURT:

Let me ask you, Dr. Armor, I want to ask you is that the only thing that affects achievement, desegregation?

THE WITNESS:

That is often the question in a case like this where it is offered one reason why students are scoring behind.

THE COURT:

No, I asked you if that was the only reason.

THE WITNESS:

No, it is not the only reason.

THE COURT:

Then, how can you measure whether or not it is desegregation or the fact that they may or may not, and I am not passing any judgment on it, have a lot of lousy teachers in Pasadena since 1969, or have a terrible curriculum since 1969? How can you make that determination?

.
.
.
.
.

THE WITNESS:

I am only investigating the effect of desegregation on changing rates of learning.

THE COURT:

Dr. Armor, how can you measure the effects of desegregation unless you know all of the things that go into the formula. You cannot measure apples and oranges. In the formula of education one of the aspects of it only is desegregation, isn't it? The other is curriculum and the other is teaching, isn't it?[194]

Judge Real wanted to be shown why the Board felt the education of Pasaden'a students was inadequate under the Plan; Armor's attempt at statistical inference was not sufficient proof. Armor had specified only one variable--desegregation--in his attempt to explain a decline in achievement. In so doing, he assumed that all other factors which might affect performance remained constant. Normally, this "ceteris paribus" assumption--all other things equal--makes sense. But, in an educational environment where many variables may affect student performance, to assume that all variables will remain constant when desegregation is imposed is of questonable validity. Judge Real wanted to know why changes in student performance were occuring, and Armor could not tell him.

Judge Real also questioned defense witness Robert Dilworth who had studied white flight in Pasadena from 1966 to 1973 and had been brought forth by the Board to testify about the impact of the 1970 Court Order on white flight. Essentially, Dilworth argued that, while statistically significant numbers of whites had been leaving Pasadena before 1970, the imposition of the Pasadena Plan exacerbated the problem, increasing the annual loss from the white community and creating a "white flight" situation. Real heatedly questioned the interpretation which Dilworth applied to the data.

> THE COURT:
>
> From results you can infer? What inference can you make as to what makes Sammy run from how far he runs? Can you do that statistically, Doctor?
>
> .
> .
> .
> .

> MR. PAUL /Lawyer for the Defense/:
>
> I renew my offer of proof in the light of your Honor's voir dire, if you will, your full and thorough questioning of the witness. I do submit, your Honor, that this is scientific conclusion.
>
> THE COURT:
>
> It isn't, counsel. It isn't scientific at all, because he doesn't know why /white people left Pasadena/.[195]

Real refused to acknowledge any correlation between the 1970 integration Order and white flight.

Jane Mercer, a sociologist at U.C. Riverside, later critiqued Dilworth's statistical techniques, saying that they were not normal demographic techniques, but rather economic techniques which would give the appearance of a greater amount of white flight than had actually occurred.[196]

The plaintiff's major witness was Jane Mercer, and she provided some evidence which Real was happy to receive. She testified and used Dr. Armor's charts to demonstrate that the scores of higher-achieving white children are not depressed by their being placed in classrooms with lower-achieving children.[197]

> . . . /T/here is no drop in the white achievement. That has been a consistent finding in all of the studies. Dr. Armor's charts reflect that fact in Pasadena. Desegregating the schools and putting lower achieving children into classes with higher achieving white children does not in fact seem to depress the scores of higher-achieving white children.[198]

Other testimony supportive of the Plan was also given. The Board's own witness, administrative staff member, Joseph Zeronian, testified that academic achievement had been improving since 1973, three years after the Plan was instituted, a period of time which he later said had been expected to pass before student performances would begin to be impressive.[199]

And Real himself not uncharacteristically helped prod some important supportive testimony from a witness, Superintendent Ray Cortines. Fred Okrand, ACLU lawyer for the plaintiffs, was questioning the Superintendent about the Board's proposed alternative plan as compared with the present Pasadena Plan.

> Q:
>
> As Superintendent of the schools do you recommend the proposed plan in preference to the current plan?
>
> A:
>
> I think you are talking about a board policy issue. The Board of Education has established that this is the plan, the majority of the Board of Education, that they desire for the Pasadena Unified School District. It is incumbent then upon the administrative staff of that district to carry out the board policy.
>
> I have said publicly that this policy--I mean this plan adopted by the board if approved by the court[,] that I would work to make it successful in the Pasadena Unified School District. It is a matter of board policy, as I see it and interpret it.
>
> Q:
>
> My question, Mr. Cortines, is whether you as Superintendent believe the plan to be preferable to the current plan.
>
> MR. PAUL:
>
> I think it is immaterial, Your Honor, and I object to it on that ground.
>
> THE COURT:
>
> The objection is overruled. I hate to put you in that spot, Mr. Cortines, but we've got to do it.
>
> (BRIEF PAUSE.)

THE WITNESS:

I believe that the present plan since its inception and implementation--since its implementation has improved and that through the staff effort they have--we have been able together to iron out some of the problems that faced the school district in implementing a completely new plan.

I am cognizant of some of the give-ins under the Pasadena Plan, some of its strengths and some of its weaknesses. I believe the plan needs to be modified, the Pasadena plan.

I believe there needs to be some relief from a majority of any minority in any school.

I also believe that the nodified plan is educationally sound and provides educational opportunities that are fine and some that are outstanding.

As I have said, I guess it is time, it is a matter of board policy and I feel very strongly about the board regardless of who they are, whey they set policy carrying it out. If I had to make my decision, if I were the only one involved I would continue the Pasadena Plan with modifications.[200]

As if his involvement in the presentation of testimony were not enough, Judge Real felt compelled to turn Mr. Paul's closing arguments into a Socratic dialogue.

MR. PAUL:

Your Honor, the Pasadena Plan, as your Honor approved in March of 1970, which is the date here, I don't believe, your Honor, that the draftsmen or this court on that occasion when the plan was approved ever considered the provisions of this plan which are now relied upon by the court to say that we have been on notice throughout that we had to conform constantly and continually with the no majority of any minority provision and that that provision relating to any school in 1970 was intended by the court to have application to any school in 1974.

THE COURT:

Mr. Paul, I can assure that I may not know what the writers of this plan had in mind when they submitted it to me because I haven't asked them why. And I think you have to ask them why they do things. But I can assure you that I studied this plan and I knew this plan. I knew what I thought it was going to accomplish. And I thought it was going to accomplish, if executed in good faith, that Pasadena would never be back in this courtroom again. Now, that meant to me that at least during my lifetime there would be no majority of any minority in any school in Pasadena.

MR. PAUL:

Your Honor was appraised in October 1971 that that hope would not be realized because you were then informed--

THE COURT:

I recognize that and I just told you as I told Mr. Lowe I am not a policeman. I don't go out and look for lawsuits.

MR. PAUL:

In any event, your Honor knew that the plan was failing insofar as the ability to maintain that no majority of any minority standard in 1971. And your Honor is aware on the basis of the evidence here that it has gotten progressively worse and it will continue to get progressively worse. The evidence shows, your Honor, it will continue unless there is annual redistricting. The evidence further shows, your Honor, without contradiction, I think, that educators believe that constant redistricting is very damaging to students and injurious to their relationships with their parents and the parents with the children. It has a very poor effect on their educational achievement.

Now, you know, if we are going to have--

THE COURT:

But you see the problem, Mr. Paul, is nothing has been brought to me, that is the problem. You know, everybody says the plan is wrong but nobody has brought to me, for instance, a plan to say here is a plan, Judge, that we won't have to redistrict for five years, or ten years, or 20 years.

MR. PAUL:

We thought we had brought such a plan to you in the alternative plan, not with the idea of providing any guarantees to the court that that would be the result because obviously no one could make that guarantee.

> THE COURT:
>
> That is right.
>
> MR. PAUL:
>
> But in its sincere belief, your Honor--in the sincere belief that if the alternative plan may be implemented that it is the belief of the school board that the effect of that plan, given a fair trial, will be to reestablish ethnic stability in the Pasadena school system.
>
> THE COURT:
>
> You have your opportunity to convince me, Mr. Paul.[201]

Paul attempted to meet this challenge, arguing that "...the evidence that we have introduced was designed to show that the Pasadena Plan has in fact failed in certain particulars. We never intended and have made no attempt and do not believe that the Pasadena plan has failed to provide the children of Pasadena with good educational opportunities. But we do say, your Honor, that the evidence before this court if fairly interpreted shows, we believe conclusively, that the Pasadena plan has failed utterly in two respects..., [education quality has declined and white flight has been induced]." [202]

Judge Real accepted neither of these contentions. From the bench he told the litigants how he felt about forced versus voluntary busing and about educational performance.

> "...I think that they [the children] have made their contribution [to the successful implementation of the Plan], and I think everybody else should make theirs.
>
> I think the input that can be accomplished and can be considered by the staff in the Pasadena School District appears to have been, I think from the evidence at least, very largely ignored by the Board in what appears to be from the evidence a well-settled idea that the present Pasadena plan couldn't, can't, doesn't, and won't work. I think all of these attitudes are

> negative attitudes. Substituting a plan that has as its only guarantee that if we stop forced bussing, because that is the thrust of the plan, we can convince white parents to forego neighborhood schools, because that is what the thrust is. And we can do that by attractive programs and the attractive programs can be successful by the providing of voluntary bussing. All you have changed is the word 'voluntary' from 'forced', at least in the arguments of those who talk about bussing."[203]
>
> "...[T]he sound education programs that at least the evidence has indicated are really only the ribbon which was around the package that was presented to the court ...[were] almost entirely, I think, completely dedicated to the question that so-called forced bussing would be eliminated from the Pasadena School District. The sound educational programs, because I think they are accommodated in that plan, and, therefore, I reject that request.
>
> For that reason the motion of the defendants to modify the judgment of this court dated January 22, 1970, is denied."[204]

Judge Real's written opinion spoke directly to the issue of white flight and the Board's contention that a free choice plan, i.e., voluntary busing, would stabilize the racial composition of Pasadena. In condemning this alternative, Real was quite biting:

> "Hope may spring eternal, but realism exposes the folly of the belief that one who left a school district because his children were forced to attend schools with Negro children would now voluntarily choose that alternative."[205]

To grant relief from the Order, Real reasoned, would, "...in light of the avowed aims of four members of a five member Board [,] surely be to sign the death warrant of the Pasadena Plan and its objectives."[206]

As Real saw it, all of the evidence pointed to foot-dragging and subverting of the plan.[207] The Board did not seek relief for the problems facing particular schools. "They never said, 'Judge, we can't live with this part of the Plan... or this aspect.'"[208] "[T]hey wanted to scrap the Plan."[209]

Real's options were extremely limited. He could approve what was essentially a freedom of choice plan or he could deny the Board's motions. "A judge is not a proposer; he can only take what they bring hom."[210] Superintendent Cortines testified that he had suggested to the Board that they go before the court to ask for specific changes in the Plan.[211] The Board said "no"; they wanted to be relieved of the Court's jurisdiction altogether. The result was almost preordained: a denial of all of the Board's motions.[212]

Only three months passed before Real heard a motion to show cause why the Board should not be held in contempt of the court order.[213] The contempt proceedings were brought by a parent who was unhappy with the Board's policy of "temporarily" hiring white workers so as to circumvent the Pasadena Plan. Three anti-integration Assistant Superintendents had been hired and placed under Superintendent Cortines, thus enabling the Board to keep "a tighter rein" on him.

Real assessed the Board's circumventions of the Pasadena Plan as acts not only in contempt of the Court's orders, but as acts which appear to "preclude any element of good faith".[214] Real found the School District in contempt and ordered them to comply with his Order and vacate the appointments, or pay a fine.[215]

In looking back on the contempt case, Real felt that the "Board was going to do everything it could to defeat the Pasadena Plan.[216] They talked about the plan as if it had been designed by Judge Real. It was "never Judge Real's plan. The Judge approved the plan as received."[217] The Board wanted to let demography take over,[218] to ignore the Pasadena Plan altogether. The "only importance of [the] contempt thing was [that] ... it was a vehicle ...to spell out...what [the] Plan means."[219]

THE APPEAL

If the contempt case did spell out what the Plan meant, it is obvious that the Board was not content with that meaning. Sometime before the contempt hearings took place, the Board appealed Judge Real's denial of their motion to vacate his 1970 Order, sending the case to the Appellate Court, where a three-judge panel affirmed Judge Real's decision.[220] All three judges, however, expressed reservations about Real's notion that the District Court could or should enforce a "no majority of any minority" standard over a long period of time, viz., during his lifetime.[221]

The issues before the Appellate Court were few: Had the District Court erred in its decision? Was a modification of the 1970 Order justified? Should jurisdiction be relinquished by the District Court? Could an alternative plan be substituted for the present Pasadena Plan?[222]

In his majority opinion, Judge Ely recognized that a

> "careful review of the record reveals abundant evidence upon which the district judge, in the reasonable exercise of his discretion, could rightly determine that the "dangers" which induced the original determination of constitutional infringements in Pasadena have not been diminished sufficiently to require modification or dissolution of the original Order."[223]

Here was substantive support for Real's decision.

Ely went on to address directly Real's belief that the School District's proposed alternative plan constituted "a plan of the 'freedom of choice' variety which would very likely result in rapid resegregation."[224] Speaking for the Court, he said, "we are inclined to agree."[225] He quoted Kelly v. Guinn[226], where the Court had observed: "Freedom of choice plans usually, if not invariably, fail to eliminate school segregation...[O]nce it has been determined that a school district has contribued to the creation and maintenance of segregation, neutrality is no longer enough. Then the school district's duty is not limited to the removal of discriminatory bars to school integration; it is charged with an affirmative duty to eliminate segregation." While acknowledging the School District's assertions with regard to white flight, Ely reiterated the District Court's rejection of the "White flight" contention, for even if white flight existed, "the Supreme Court has indicated that the existence of a 'white flight' phenomenon does not excuse a school system from the constitutional duties imposed by *Brown* and its progeny."[227]

Ely offered a cogent response to the School Board's contention that a constitutionally unitary school system has been established and that, therefore, the District Court was required to relinquish jurisdiction. Citing *Swann*, the Board argued that, "neither school authorities or district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."[228] Ely replied,

> "The directive of the dictum in *Swann* by its very terms becomes operative 'once the affirmative duty to desegregate has been *accomplished* and racial discrimination is *eliminated* from the system.' 402 U.S. 1, 31-32, 91 S. Ct. 1267, 1284, 28 L.Ed 2d 554 (1971) (emphasis added). On the specific facts of this case as revealed from the record..., it was reasonable for the District Court to conclude that full and effective elimination of racial discrimination had not been achieved during the three school years following the initial year in which the Pasadena Plan was in effect. If desegregation was 'accomplished' or 'eliminated' after the implementation of the Pasadena Plan, such was a transitory and temporary achievement, enduring for a period of utmost brevity."[229]

The Board argued that once de jure segregation was eliminated, de facto segregation was irrelevant. Ely asserted that there is a need for "a full and genuine implementation which has eliminated, with some anticipated permanence, racial discrimination from the system."[230] In the absence of this "full and genuine implementation," Real was well within his jurisdiction in denying the motions of the Board

Notwithstanding the Appellate Court Opinion's general tone in support of Judge Real's decision, each of the three judges raised questions about the permanence of the "no majority of any minority" standard envisioned by the District Court. Ely said, "[w]e must...expressly disapprove such portions of the record as suggest that the district judge interprets his injunction to require continuous annual redistricting."[231] "This is precisely what we interpret Swann to prohibit."[232] And, while the standard itself does not require annual redistricting per se, as embraced in the 1970 Pasadena Plan, it cannot be met without such redistricting.

In his concurring opinion, Judge Chambers particularized his opposition to annual redistricting. His common sense reasoning led him to state: "we cannot perpetually homogenize school children every September. It won't be much of an education for any child if children have to go to a different school every year. Furthermore, a school district surely should not be kept under injunctions of a court forever."[233] The themes of Swann, absent the citations, are clearly present here.

Judge Wallace's dissent argued that the "test for retaining jurisdiction and continuing a desegregation injunction in effect is not the school district's maintenance of an inflexible racial balance but whether 'the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.' [402 U.S. at 31-32, 91 S.Ct. at 1284.]"[234] Since "the district court did not consider this question,...it failed to apply the proper test and, therefore, I would reverse and remand."[235] Clearly, Wallace sees the trial record as well as Swann in a very different light than do the other two justices. "The fundamental flaw in the district court's decision is its premise that there is no difference between de facto and de jure segregation. In its written opinion, the district court takes the position that the two are indistinguishable."[236] Wallace cites as proof of this conclusion a footnote[237] from the 1974 District Court Opinion: "There appears to be, in logic, no distinction between de jure and de facto segregation for our purposes. 'De Jure' and 'de facto' are only adjectives that give some attempted 'legal' distinction to the aims of Brown..."[238] And, clearly, a public address Real gave in 1970 confirms Judge Wallace's conclusion.[239] Wallace says that the 9th Circuit has clearly spoken out against this blurring of distinction: "[W]e have rejected the equivalence of de facto and de jure segregation and have held that segregation in public schools is unconstitutional only if it is de jure segregation; that is, only if it results from intentionally segregative state action.... [T]he justification for the desegregation decree in this case must be the de jure segregation found to exist in 1970, not de facto segregation existing before or after that date."[240] Wallace fails to address the crucial point upon which Real implicitly bases and Ely explicitly affirms the District Court's decision: The segregation which existed in Pasadena between 1970 and 1974 was de jure segregation.[241]

The rest of Wallace's dissent is based on the premise that de facto segregation has not been distinguished from de jure, that the former has been "remedied" as if it were the latter. In this context, Wallace discusses the injunction of the District Court: "The Supreme Court has expressly rejected the view that a desegregation injunction is designed to produce any specific degree of racial balance."[242] Citing Swann,[243] Wallace reinforces his point: "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."[244] In sum, "[t]he district court's decision is inconsistent with these principles."[245] Real's interpretation of his injunction as a lifetime commitment to "no majority of any minority" in any Pasadena school "transforms racial balance from a means of remedying de jure segregation into an end in itself, precisely contrary to the principles expressed by the Supreme Court [in Swann[246]]."[247]

Wallace further argues that the Board's motion for dissolution of the injunction and substitution of the Alternative Plan is inflexibly treated by the district court because the court fails to distinguish de jure from de facto segregation. "The question not addressed by the district court is crucial: whether the segregation foreseeable upon dissolution of the injunction is attributable to intentionally segregative actions of the school district."[248] "Although the Alternative Plan is a freedom-of-choice plan and therefore an unlikely remedy for past de jure segregation,...it hardly follows that it is motivated by an intent to segregate or that it necessarily reflects the effects of past de jure segregation. The district court did not decide whether the Alternative created or perpetuated de jure segregation..."[249]

The issue for Wallace, then, is whether de jure segregation has been abolished. The burden of proof on the school district is not easily met:[250] "[T]he Board must show that the Alternative Plan is not motivated by an intent to segregate..."[251] For these explicit determinations, Wallace would reverse and remand.[252]

The Board did not sit long with this affirmance of Real's decision. The Appellate Court decision was handed down on May 5, 1975[253]; a petition for writ of certiorari was granted on November 11, 1975.[254] The Supreme Court heard arguments on April 27 and 28 of 1976 and decided the case on June 28.[255] The order of the Court was clear and simple: "We vacate the judgment of the Court of Appeal and remand the case to that court for further proceedings."[256] The reasoning which led to this conclusion was not so clear and simple.

Justice Rehnquist, speaking for the Court, first acknowledged that the 1970 decree of the District Court was no longer at issue. What was before the Court was the question "of whether the District Court was correct in denying relief when petitioners in 1974 sought to modify the 'no majority' requirement as then interpreted by the District Court."[257] To answer this question, Rehnquist did two things. First, he cited the stipulation joined in by the Government and the original plaintiffs which stated "that they were aware 'of no violations of the Pasadena Plan up to and including the present.'"[258] Here, Rehnquist ignores Real's rejection of the stipulation, the right to reject it being specifically affirmed by the Appellate Court.[259] Second, beyond the stipulation, Rehnquist argues that "[p]etitioners have argued that they never understood the injunction, or the provisions of the Plan which they drafted to implement that order, to contain such a requirement either."[260] This assertion by the petitioners is puzzling, given that the Pasadena Plan explicitly calls for annual reviews of elementary school attendance areas "to assure that ethnic balance is maintained."[261]

Rehnquist contrasts these (mis)understandings of the judicial standard with Real's own notion about its "lifetime" quality:[262]

> "The District Court's interpretation of the order appears to contemplate the 'substantive constitutional right [to a] particular degree of racial balance or mixing' which the Court in Swann expressly disapproved. 402 U.S., at 24, 91 S.Ct. at 1280. It became apparent, at least by the time of the 1974 hearing, that the District Court viewed this portion of its order not merely as a 'starting point in the process of shaping a remedy,' which Swann indicated would be appropriate; 402 U.S., at 25, 91 S.Ct. at 1280, but instead as an 'inflexible requirement,' id., to be applied anew each year to the school population within the attendance zone of each school."[263]

> "[I]n Swann the Court cautioned that 'it must be recognized that there are limits beyond which a court may not go in seeking to dismantle a dual school system. 402 U.S., at 28, 91 S.Ct. at 1282. These limits are in part tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation for '[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis.' Ibid. While the District Court found such a violation in 1970, and while this unappealed finding afforded a basis for its initial requirement that the defendants prepare a plan to remedy such racial segregation, its adoption of the Pasadena Plan in 1970 established a racially neutral system of student assignment in PUSD. Having done that, we think that in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school, the District Court exceeded its authority."[264]

In other words, the 1970 Pasadena Plan accomplished what was constitutionally required, the establishment of a neutral attendance system; further annual actions should not have been ordered.

Justice Marshall, in dissent, interpreted Swann somewhat differently than did Justice Rehnquist. While he acknowledges[265] that Swann requires neither school authorities nor district courts to make "year-by-year adjustments"[266], he maintained that this freedom may be enjoyed if, and only if, "the affirmative duty to desegregate has been accomplished."[267] Marshall interpreted Swann as recognizing "on the one hand that a fully desegregated school system may not be compelled to adjust its attendance zones to conform to changing demographic patterns [, but on the other hand,] ...that until such a unitary system is established, a district court may act with broad discretion--discretion which includes the adjustment of attendance zones--so that the goal of a wholly unitary system might be sooner achieved."[268] (His emphasis.) Marshall's point is simple but fundamental: until the whole school system is desegregated and functioning in a nondiscriminatory manner, the Supreme Court, "[i]n insisting that the District Court largely abandon its scrutiny of attendance patterns, ...might well be insuring that a unitary school system in which segregation has been eliminated 'root and branch', Green v. County School Board, 391 U.S. 430, 438, 88 S.Ct. 1689, 1694, 20 L.Ed. 2d 716 (1968), will never be achieved in Pasadena."[269]

Rehnquist addressed a second principal issue in his majority opinion, whether de jure segregation took place between 1970 and 1974. He says there was "no showing in this case that those post-1971 changes in the racial mix of some Pasadena schools which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to the defendants."[270]

The "quite normal pattern of human migration resulted in some changes in the demographics of Pasadena's residential patterns, with resultant shifts in the racial makeup of some of the schools. But...these shifts were not attributed to any segregative actions on the part of the defendants..."[271] Therefore, it is necessary to question the District Court's "continuing supervision" of the School District, and its willingness to modify the original injunction.[272]

Rehnquist cited System Federation v. Wright, 364 U.S. 642, 647, 81 S.Ct. 368, 371 (1961) as authority on the modification issue:

> "[A] sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief."[273]

Rehnquist argued that circumstances both of law and fact have changed, the former with the intervening decision in the Swann case, the latter with the implementation of the Pasadena Plan. The ambiguity of the "no majority of any minority" provision coupled with the intervening Swann opinion "make a sufficiently compelling case so that such modification should have been ordered by the District Court."[274]

Simply, Justice Rehnquist maintained that, from 1971 to 1974, the Pasadena Unified School District adopted an integrative plan and administered it in a nondiscriminatory manner. No de jure segregation took place during the period, and the District Court should have vacated, or at least modified, its original order.

In dissent, Justice Marshall addressed these issues of de jure segregation and continuing supervision in a somewhat different manner. He raised the question of timing, i.e., when should a higher court reverse a lower court by ordering the modification of a desegregation injunction? Marshall argued that at:

> "the time that the District Court acted on the request for modification, the violation had not yet been entirely remedied. Particularly given the breadth of discretion normally accorded the District Court in fashioning equitable remedies, I see no reason to require the District Court in a case such as this to modify its order prior to the time that it is clear that the entire violation has been remedied and a unitary system has been achieved. We should not compel the District Court to modify its order unless conditions have changed such that 'dangers, once substantial, have become attenuated to a shadow.' United States v. Swift & Co., 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932)."[275]

In other words, mere compliance with the order of the court is not sufficient; compensatory results must be realized as well.

Marshall raised a crucial issue which Rehnquist did not explicitly address: for how long must literal compliance with a court's injunction take place before that injunction is modified? Rehnquist's Opinion, according to some,[276] answers, ["One day, the first day of school;" "until dangers are attenuated to a shadow," says the dissent.

Each of the Supreme Court's major objections to Judge Real's 1974 Opinion was based on one question to which it demanded a clearer answer: What is "the appropriate scope of equitable relief in this case?"[277] The decision of the Court vacated and remanded the case to the Appellate Court for a determination of "the appropriate scope of equitable relief" and new findings of fact concerning the 1974-1976 period.[278]

Six months later, on January 24, 1977, a three judge panel (Chambers, Ely, and Wallace, again) of the Appellate Court issued a two page opinion which concluded "that all determinations as to modifications required under Pasadena City Board of Education v. Spangler, 96 S.Ct. 2697 (1976) of the district court's decrees of 1970 and 1974, should initially be made by the district court."[279] The court went on to state that the "no majority of any minority" standard cannot stand as a "bald unqualified order".[280] Lastly, it reiterated the Supreme Court's call for a re-analysis of the existing record supplemented by hearings so as to resolve the questions mentioned in the majority opinion of the Supreme Court. "Further..., we do not go."[281]

THE FINAL WORD

In 1977, Judge Real reflected on the situation in Pasadena and his desegregation order. Asked if he might have accomplished more by compromising in 1974, he replied, "There was no other way to accomplish desegregation in Pasadena."[282] "I don't know where it [a new plan] would go."[283]

The problems of forced busing and resultant white flight concerned Judge Real. He saw no alternative to forced busing: "[W]hat is the alternative? Segregated schools."[284] "[I]t's an emotional thing...nobody likes their children to be bussed any place..., and it's purely emotional. And emotion doesn't make it right."[285]

As to the subject of white flight, Real said, "White flight is a problem. But I don't think that the Constitution permits us to alter its requirements by the fact of whether whites [or black or anyone else] like or dislike it."[286]

The Constitution "was designed for an ordered society."[287] If forced busing and white flight result from meeting its requirements, so be it. "If we are going to have an ordered society, that's the way we have to go."[288]

Footnotes

1. Sanford Cobb and Datum Smith, If This Be Treason, A Foolish Guide Book to Pasadena (Pasadena: Burns Printing Co., 1928), p. 7.

2. Andrew Rolle, Pasadena, Two Centuries of Growth (Los Angeles: Richard Nosoff, 1969), p. 6.

3. Wade Hopkins, Pasadena, California: The Crown of the Valley (Pasadena: Hopkins-Smith, Publishers, 1924), p. 15.

4. Harold D. Carew, History of Pasadena and the San Gabriel Valley, Volume 1 (S. J. Clarke Publishing Co. 1930), p. 305.

5. Personal interview with Maurice Feigenberg, my father, native Californian since 1922.

6. W. L. Blair, ed., Pasadena Community Book (Post-War Edition) (Pasadena: Arthur W. Cawston, Publisher, 1947), pp. 201-202.

7. Id. at 214

8. Id. at 427.

9. Rolle, supra Note 2 at 17.

10. Id.

11. Hopkins, supra Note 3 at 15.

12. Id. at 18.

13. Personal Interview with LuVerne LaMotte, a member of the Board of Education from 1957 to 1973, November 24, 1976.

14. Department of Planning, Research and Development, PUSD, "Analysis of Student Achievement Test Scores in the Pasadena Unified School District Between 1969 and 1973, Volume II", Pasadena, May, 1974), p. 15.

15. Telephone Interview with Jane Mercer, a sociologist at U.C., Riverside, who studied Pasadena in the early 1970's, February 9, 1977.

16. Id.

17. Id.

18. Department of Planning, Research and Development, PUSD, supra Note 14 at 15.

19. Pasadena Unified School District, "Plan for the Integration of the Pasadena Unified School District", (Pasadena, March, 1970), p. 1.

20. Telephone Interview with Ken McCormack, (a graduate of Pasadena High School who worked intermittently for the school district and lived in Pasadena on-and-off throughout the entire 1970-1976 period), November 18, 1976.

21. *Id.*

22. *Id.*

23. Telephone Interview with John McDermott, head of the Western Center on Law and Poverty in Los Angeles, November 11, 1967.

24. *Nancy Anne Spangler v. Pasadena City Board of Education* 311 F. Supp. 501 (C. D. California 1970).

25. Superintendent's Office, Pasadena Unified School District, "Pasadena Plan for Integration", (a four-page pamphlet summarizing the Plan's background, history, advantages and disadvantages), (Pasadena, c. 1975), p. 1.

26. 311 F. Supp. at 508.

27. Superintendent's Office, *supra* Note 25 at 1.

28. *Jay R. Jackson v. Pasadena City School District*, 31 Cal.Rptr. 606, 382 P.2d 878 (1963).

29. *Id.* at 607.

30. *Id.* at 608.

31. *Id.* at 609.

32. *Id.* at 610.

33. *Id.*

34. McDermott, *supra* Note 23.

35. 311 F. Supp. at 509-511; Personal Interview with James and Bobbie Spangler, parents of the named plaintiff, November 21, 1976.

36. 311 F. Supp. at 509.

37. *Id.* at 510.

38. "Memorandum of the United States Summarizing Evidence from 1970 Hearing Relating to the Use of Voluntary Student Assignment Systems in Pasadena", February 28, 1974 (in Volume 9, 8/14/73 to 7/15/74, of court papers related to Civ. 68-1438-R, U.S. District Court, Central District, California).

39. 311 F. Supp. at 510.

40. Telephone Interview with Lynn Vernon, a Pasadena resident, former PTA member, and member of the staff of PUSD's Department of Planning, Research and Development, February 29, 1977.

41. 311 F. Supp. at 510.

42. Spanglers, supra Note 35.

43. Spanglers, supra Note 35.

44. Pasadena Star-News, January 8, 1970 (hereafter cited as PSN).

45. Personal Interview with Sam Sheats, a member of the board from 1971-1973, November 22, 1976.

46. Spanglers, supra Note 35.

47. Edgar Paul Boyko, Transcript of 1970 Trial, p. 2398 (hereafter cited as 1970 Tr.).

48. 1970 Tr. pp. 1376, 1389.

49. Supra Note 40.

50. Id.

51. PSN, August 29, 1968.

52. Telephone Interview with Joe Wyatt, a Pasadena attorney who helped the Spanglers in the initial stages of assembling their case, November 18, 1976.

53. Spanglers, supra Note 35.

54. Spanglers, supra Note 35; telephone interviews with Michael Roberts, attorney for the plaintiffs in the 1970 trial, November 1976, and Midi Cox, an analyst in the Education Division of the Rand Corporation, Santa Monica, November 11, 1976.

55. McCormack, supra Note 20.

56. Telephone Interview with Charles Quaintance, the Justice Department's attorney who headed the government's team at the 1970 trial, March 3, 1977.

57. Id.

58. 415 F.2d 1242, 1248 (9th Circuit 1969).

59. Personal Interview with Fred Jacobsen, a United States Attorney in Los Angeles, January 6, 1977.

60. McCormack, supra Note 20.

61. Spanglers, supra Note 35.

62. McDermott, supra Note 23.

63. Personal Interview with Gene Wiberg, a major politico of Pasadena's conservative camp, November 22, 1976.

64. McDermott, supra Note 23.

65. Wiberg, supra Note 63.

66. Id.

67. Id.

68. Personal Interview with Manuel L. Real, federal judge of the Central District of the 9th Circuit, January 6, 1977.

69. Wyatt, supra Note 52.

70. 1970 Tr. p. 21.

71. 1970 Tr. p. 27.

72. 1970 Tr. p. 2405.

73. Real, supra Note 68.

74. 1970 Tr., Volumes I - IX.

75. Quaintance, supra Note 56.

76. 1970 Tr., Volumes I and IX.

77. 1970 Tr. p. 110.

78. Quaintance, supra Note 56 and Spanglers, supra Note 35.

79. Quaintance, supra Note 56.

80. Id.

81. Id.

82. 1970 Tr. pp. 13-14.

83. 1970 Tr. p. 9.

84. 1970 Tr. p. 1369.

85. 1970 Tr. p. 1372.

86. 1970 Tr. p. 1372.

87. 1970 Tr. p. 1374.

88. 1970 Tr. p. 1375.

89. _PSN_, January 16, 1970.

90. Real, _supra_ Note 68.

91. _Id_.

92. See text, _supra_ Notes 85-88.

93. 1970 Tr. p. 1375.

94. 1970 Tr. pp. 2356-2357.

95. 1970 Tr. p. 2358.

96. 1970 Tr. p. 2380-2381.

97. 1970 Tr. pp. 2383-2384.

98. 1970 Tr. p. 2385.

99. Real, _supra_ Note 68.

100. 1970 Tr. p. 2399.

101. 1970 Tr. p. 2400.

102. 311 F. Supp. at 501.

103. Real, _supra_ Note 68.

104. 311 F. Supp. at 504.

105. _Id_. at 501

106. 1970 Tr. pp. 2400-2401.

107. 1970 Tr. p. 2401.

108. Manuel L. Real, Unpublished Speech of December 3, 1970, (no title), p. 13.

109. Id. at pp. 16-17.

110. 311 F. Supp. at 505.

111. Id.

112. Id.

113. Real, supra Note 68.

114. PSN, January 16, 1970.

115. 1970 Tr. p. 419.

116. PSN, January 16, 1970.

117. Id.

118. Real, supra, Note 68.

119. Real, supra, Note 68.

120. Los Angeles Times, March 5, 1970 (hereafter cited as LAT).

121. Id.

122. 1970 Tr. p. 2404.

123. 1970 Tr. p. 2405.

124. 1970 Tr. p. 2405.

125. United States v. Indianola School District, 410 F.2d 626, 631 (9th Circuit, 1969).

126. PSN, January 22, 1970.

127. LaMotte, supra Note 13.

128. PSN, January 23, 1970.

129. Id.

130. PSN, January 27, 1970.

131. Personal Interview with Joseph Zeronian, an administrator for the Pasadena Unified School District, November 24, 1976.

132. PSN, January 27, 1970.

133. Id.

134. Id.

135. Real, supra Note 68.

136. Quaintance, supra note 56 and Real, supra Note 68.

137. PSN, January 27, 1970.

138. Id.

139. Id.

140. PSN, February 4, 1970.

141. Telephone interview with Shirley Mauller, chairman of the education department of the League of Women Voters in Pasadena, February 9, 1977.

142. Id.

143. Vernon, supra Note 40.

144. Personal interview with Ted Neff, a staff consultant in the State Department of Education's Bureau of Intergroup Relations, February 24, 1977.

145. Transcript of 1974 Trial, p. 20 (hereafter cited as 1974 Tr.).

146. LAT, March 5, 1970.

147. Id.

148. Real, supra Note 68.

149. 427 F.2d 1352 (9th Circuit, 1970).

150. Real, supra Note 68.

151. Quaintance, supra Note 56.

152. Mauller, supra Note 141.

153. "Plan," supra Note 19 at 21.

154. Id. at 2.

155. Real, supra Note 68.

156. This trust was not misplaced. See text at Note 162, infra.

157. Real, supra Note 68.

158. Id.

159. Pasadena Unified School District, "From Desegregation to Integration--A Program for the Elimination of Problems Incidental to Desegregation", (Pasadena, February, 1972), p. 4.

160. Pasadena Unified School District, "3R's: Reports, Reviews, Reasons from the Office of the Superintendent", (Pasadena, October 9, 1970), Vol. 2, No. 1, p. 5.

161. Mauller, supra Note 141

162. Mercer, supra Note 15.

163. See text at Note 157, supra.

164. PUSD, "From Desegregation to Integration", supra Note 159 at 5.

165. Id. at 7.

166. Id.

167. Zeronian, supra Note 131.

168. McCormack, supra Note 20.

169. Id.

170. Telephone interviews with Ray Cortines, Superintendent of the Pasadena Unified School District, March 3, 1977 and March 7, 1977.

171. Id.

172. Id.

173. Spanglers, supra Note 35.

174. Id.

175. PUSD, "From Desegregation to Integration", supra Note 159 at 14.

176. Id. at 16.

177. Wiberg, supra Note 63.

178. Id.

179. Id.

180. Id.

181. Wiberg, Robert Clearwater (*PSN*, January 27, 1970).

182. Cortines, *supra* Note 170.

183. "Candidate's Statement of Qualifications", Statement of Dr. Richard Vetterli, filed with the Registrar of Voters for election of 3/6/73, undated.

184. *Id*. Statement of Henry S. Myers, Jr.

185. *Id*. Statement of Lyman Newton.

186. Cortines, *supra* Note 170.

187. 375 F. Supp. 1304 (C.D. California, 1974).

188. McDermott, *supra* Note 23.

189. 375 F. Supp. at 1305.

190. *LAT*, July 7, 1974.

191. 1974 Tr. at 20.

192. *Id*. at 20-21.

193. 375 F. Supp. at 1309.

194. 1974 Tr. at 425-429.

195. *Id*. at 506-507.

196. Mercer, *supra* Note 15.

197. 1974 Tr. at 660.

198. *Id*. at 659-660.

199. Zeronian, *supra* Note 131.

200. 1974 Tr. at 395-397.

201. *Id*. at 689-691.

202. *Id*. at 693-694.

203. *Id*. at 760-761.

204. *Id*. at 766-767.

205. 375 F. Supp. at 1308.

206. *Id*. at 1309.

207. Real, supra Note 68.

208. Id.

209. Id.

210. Id.

211. Id.

212. 375 F. Supp. at 1309.

213. 384 F. Supp. 846 (C.D. California, 1974)

214. Id. at 850.

215. Id. at 851.

216. Real, supra Note 68.

217. Cortines, supra Note 170.

218. Real, supra Note 68.

219. Id.

220. 519 F.2d 430 (9th Circuit, 1975).

221. 519 F.2d at 437-438; concurring opinion, 519 F.2d at 440; dissenting opinion, 519 F.2d at 443.

222. Id. at 431.

223. Id. at 434.

224. Id. at 435.

225. Id. at 439.

226. 456 F.2d 100, 108-109 (9th Circuit, 1972).

227. 519 F.2d at 435.

228. Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 31-32, 91 S.Ct. 1267, 1283-1284, 28 L.Ed.2d 554 (1971) (dictum); cited at 519 F.2d at 436.

229. 519 F.2d at 437.

230. Id.

231. Id. at 437-438.

232. Id. at 438.

233. Id. at 440.

234. Id. at 441.

235. Id.

236. Id.

237. 375 F.Supp. at 1307 n. 10.

238. 519 F.2d at 441 n. 1.

239. See text at Note 108, supra.

240. 519 F.2d at 442.

241. "In light of the School District's failure fully to comply with the 'no majority of any minority' requirement for three successive years, and the fact that appellants sought to substitute a 'freedom of choice' type of plan that the court found would likely result in resegregation, it was reasonable for the District Court to conclude that all vestiges of de jure segregation had not been eliminated." Id. at 438.

242. Id. at 442.

243. 402 U.S. at 24, 91 S.Ct. at 1280.

244. 519 F.2d at 442.

245. Id. at 443.

246. Id. at 442. ("If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." 402 U.S. at 24, 91 S.Ct. at 1280.)

247. Id. at 443.

248. Id. at 444.

249. Id.

250. Id. at 445.

251. Id. at 446.

252. Id. at 441.

253. *Id.* at 430.

254. *Pasadena City Board of Education v. Spangler*, 96 S.Ct. 355 (1975).

255. *Pasadena City Board of Education v. Spangler*, 96 S.Ct. 2697 (1976).

256. *Id.* at 2701.

257. *Id.* at 2703.

258. *Id.*

259. 519 F.2d at 434-435 n. 4.

260. 96 S.Ct. at 2703.

261. "Plan," at 2703.

262. 96 S.Ct. at 2703.

263. *Id.* at 2703-2704.

264. *Id.* at 2704.

265. *Id.* at 2708.

266. 402 U.S. at 31-32, 91 S.Ct. at 1284.

267. *Id.*

268. 96 S.Ct. at 2708.

269. *Id.*

270. *Id.* at 2704.

271. *Id.*

272. *Id.* at 2705-2706.

273. *Id.* at 2705.

274. *Id.*

275. *Id.* at 2708.

276. Real, *supra* Note 68.

277. 96 S.Ct. at 2707.

278. *Id.*

279. ___ F.2d ____. (Slip opinion, U.S. Court of Appeal, 9th Circuit; Order on Remand, 74-2116, 1/24/77, at p. 1.)

280. Id.

281. Id. at 2.

282. Real, supra Note 68.

283. Id.

284. Id.

285. Id.

286. Id.

287. Id.

288. Id.

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DENVER

Elliot Marseille

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INTRODUCTION

Apart from the landmark Supreme Court decision which established that illegal segregation in one part of a school district raises a presumption of segregative intent with respect to the school district as a whole, the most prominent feature of the Keyes case is its sheer length. Nearly a decade has elapsed since the suit was filed in June of 1969. The case is not yet fully resolved.

Its length is due in part to the legal strategy employed by the plaintiffs which dictated that the proceedings be divided into two: a lengthy set of hearings on a motion for injunctive relief applying only to the Park Hills section of Denver to be followed eight months later by a full scale trial on the merits which considered charges pertaining to the school district as a whole. Another element which tended to produce both length and complexity was that attorneys on both sides of the dispute waged the legal equivalent of total warfare: No opportunity for appeal was left unpursued. Compromise and out of court agreements played almost no part in the long years of litigation.

This paper is a history of the Denver proceedings. A brief overview is offered here as a guide to the account which follows:

In June of 1969 suit was filed to restore three resolutions which would have desegregated the Park Hills schools. The U.S. District Court granted the injunctive relief sought, its decision was overturned by the 10th Circuit Court whose order was in turn vacated by the Supreme Court. In February, 1970 a trial on the merits made permanent the preliminary injunction applying to the Park Hill schools. Additional hearings were held on proposed remedial plans and the court issued its final decree and judgment in June, 1970. In March, 1971, the appeal court stayed the district court's judgment.

This stay was vacated by the Supreme Court. The court of appeal then issued its opinion and judgment which upheld plaintiff's first cause for action and denied the second cause. Plaintiffs then appealed to the Supreme Court which vacated the disputed portion of the district court's final decree and remanded the case to the district court for further hearings. In December of 1973 the court found the entire school district to be dual and ordered both plaintiffs and defendants to develop remedial plans. After protracted hearings in 1974 the court adopted the plan of its own expert (Finger) and rejected those of both plaintiffs and defendants. This final judgment and decree was appealed to the 10th Circuit Court which reversed parts of the district court decision. The Supreme Court denied the ensuing petitions for review in January, 1976.

I. A Short History of Race and Schools in Denver Prior to the Keyes Litigation

The controversy over race and education in Denver first surfaced in 1956. The Denver Public School District had built Manual High School three years earlier on the same site as an old Manual High. When it opened in 1953 it was underutilized. The school board proposed new zone boundaries for the school in 1956--ostensibly to make better use of Manual's capacity and to relieve overcrowding at nearby East High School. A citizens committee was formed to oppose the suggested boundary changes on the grounds that they had been gerrymandered to keep blacks out of East High and two junior high schools. The school board's proposals were, nevertheless, adopted in June. The citizens committee threatened court action, but to no issue.

Protests were mounted again in 1959 when the school board authorized the construction of Barrett Elementary School on a large site acquired by the board in 1948. Blacks feared that the attendance boundaries of Barrett would result in a heavily black student composition. This was, in fact, the indubitable outcome when Barrett opened in 1960.

Yet another new school construction plan, this one for a junior high in northeast Denver, became the focus of controversy in 1962. Concerted black opposition was led by CORE and the NAACP. Protest against the school board's plan was aided by a group of white residents who feared that opening a new black junior high would cause the flight of white residents from the area. The combined uproar of blacks and whites was sufficient to put the construction plan in abeyance. In the first formal acknowledgment of race as an issue in Denver's educational policy-making the school board appointed a Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools to study and report on the current status of equal educational opportunity with respect to curriculum, instruction, pupils, personnel, buildings, equipment, libraries, administration and school-community relations. The explicit mandate of the study was to focus particularly on racial factors in the consideration of these issues. The committee was composed of thirty-two members including three residents of each of eight high school attendance areas, six Denver Public Schools staff members as well as chair and vice-chairpersons. Superintendent Oberholtzer, the Deputy Superintendent, and the school board were included as nonvoting exofficio members. James Vorhees, an attorney, served as chairperson. He and another Committee member, a black woman named Rachel Noel, were to be elected to the school board in 1965 and help form a pro-desegregation majority on the board.

The Special Committee released its report in 1964. Its findings and conclusions were somewhat mixed with regard to its interpretation of school board policy. On the one hand it held that the board's boundary-setting divisions tended to perpetuate racial isolation and concentrate minority faculty in minority schools; that racial isolation resulted in unequal educational opportunity; and that the School Board and the community at large had a responsibility to eliminate the effects of segregation. On the other hand the committee report upheld the neighborhood schools concept, found that existing segregation was purely of the de facto, residential variety, and that transportation of students solely for the purpose of integration was impractical. Perhaps its substantive recommendations for improving educational quality in minority schools best reveal the committee's true colors. These included a "limited open enrollment" policy; policies on the establishment of attendance boundaries that would consider both racial and geographic factors; assignment of personnel without regard to race; the creation of a school-community relations department; and remedial reading programs. Of the 155 specific recommendations offered, the board actually implemented only one that had any real prospect of fostering racially heterogeneous schools--the limited open enrollment plan. The "limited" character of this strategy should be emphasized since transfers were to be conditioned on the availability of space in the receiving schools. No transportation was to be provided by the school system. Details of the open enrollment plan were outlined in Polity 5100 adopted by the board in May of 1964.

While the Special Study Committee deliberated over policy questions the Superintendent asked lawyers retained by the school district to submit a memorandum on the state of the law for use by the superintendent and his staff. The lawyers concluded that after the committee had presented racial data not previously compiled, the school board could no longer pursue a "color blind" policy with impunity. Once the data was available any decision which tended to aggravate de facto segregation might now be construed as an illegal intent to segregate. The memorandum also concluded that the board had no constitutional duty to alleviate de facto segregation it did not create. Partly as a result of this advice the school board opted to construct the new Hamilton Junior High in Southeast Denver rather than proceed with the original plan that had aroused so much rancour.

The school board elections of 1965 produced an important shift in the board's composition. Rachel Noel and James Vorhees, the former special committee members, and John Amesse, M.D. joined Edgar Benton, a lawyer, to form a majority willing to consider substantive changes in the Denver Public School's racial policies. To use the short-hand that prevailed throughout the controversy--they formed a pro-desegregation board.

The following year the board appointed a second study committee, this one called the "Advisory Council on Equality of Educational Opportunity in the Denver Public Schools." It was charged with advising the board on such matters as the location and financing of new school buildings with a view to relieving the overcrowding in the Northeast Denver schools, and eliminating de facto segregation in general.

The Advisory Council report published in February, 1967, emphasized the educational value of racial heterogenity and proposed a variety of strategies by which educational quality might be fostered. These included variants on the magnet school concept, upgrading the educational offerings in several black junior high schools and a "cultural arts" program. But the Council's effectiveness was undermined by a fundamental schism within its own ranks. The debate on racial policy was well on its way to being reduced to one about "busing" by Stephen Knight, Jr. who wrote a minority report criticizing the Council's major recommendations. That his was a voice to be reckoned with was boldly underlined in the May board elections. Knight and William Berge, chairperson of the Council, won on what was essentially a one-issue, antibusing platform. The pro-desegregation majority remained intact and unresolved to suspend new school construction in northeast Denver until a method could be devised for reducing both racial isolation and overcrowding.

The school board drew up a plan which would have established intermediate schools drawing racially mixed student bodies from large attendance areas. The plan was to be financed by a $32.5 million bond issue put before the Denver electorate in November. The bond election devolved into an integration debate focusing on the "forced busing" of 4700 students required by the intermediate schools plan. The business community, usually a key supporter of capital bond issues, withheld support. The issue was defeated and with it the intermediate schools plan.

Community pressure for integration by neighborhood organizations, churches, and civil rights groups was given further impetus in 1968 when test scores were released showing the disparity in academic achievement between students in predominantly Anglo schools and those concentrated in black schools. (The release of this test score data, in fact, was the decisive factor in changing the mind of one school board member--James D. Vorhees, Jr.--on the subject of race and education. He joined the ranks of the desegrationists.)[1] Additional evidence suggested that a disproportionate number of minority and inexperienced teachers were assigned to minority schools and that these schools experienced much higher rates of teacher turnover. These findings also strained the patience of the black and liberal community.

In April, shortly after the assassination of Martin Luther King, Jr., Citizens for One Community was formed. This biracial organization called for racial balance in the schools and put pressure on the school board to adopt Resolution 1490, better known as the "Noel Resolution." This proposal was introduced by Ms. Noel, the only black member of the board, on April 25, 1968 and provided in part:

> Therefore, in order to implement Policy 5100, the Board of Education hereby directs the Superintendent to submit to the Board of Education as soon as possible, but no later than September 30, 1968, a comprehensive plan for the integration of the Denver Public Schools. Such plan then to be considered by the Board, the Staff and the community, and with such refinements as may be required, shall be considered for adoption no later than December 31, 1968.

Recall that Policy 5100 had been adopted in 1964 in response to the Special Study Committee recommendations and had committed the board, at least in principle, to reducing the racial isolation in Denver's schools:

> The continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups in some schools. Reduction of such concentration and the establishment of more heterogeneous or diverse groups in schools is desirable to achieve equality of educational opportunity. This does not mean the abandonment of the neighborhood school principle, but rather the incorporation of changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees.

The Noel Resolution was tabled for one month during which pressure to accept it intensified still further. Pickets were set up at the administration building and at the homes of uncommitted School Board members. Support for the resolution was obtained from the Chamber of Commerce and the City Council. On May 16 the resolution was adopted by a vote of 5-2. The two dissenters were Berge and Knight, the members of the Advisory Council elected to the School Board in 1967.

Pursuant to the Noel resolution the new superintendent, Gilberts worked with outside educational consultants and two members of his own staff to prepare a 120-page plan entitled "Planning Educational Quality." This document was formally submitted to the Board on October 10, 1968.[2]

At the heart of Superintendent Gilberts' plan was a proposal for the creation of "school complexes." The idea is somewhat similar to the "education park" concept in that students would have the opportunity to participate in a wide variety of educational settings. The major difference is that these diverse educational experiences would not all be available at one site. Instead, a number of existing schools would be linked together with a common administration and sharing of facilities. Twelve elementary school complexes, for example, would be formed from the 92 elementary schools. One school in each complex was designated for enlargement and would provide specialized services to the students and teachers in the rest of the complex. One of the political (if not substantive) advantages of this arrangement is that it retained the neighborhood schools concept. Students would go to their local schools in the mornings, be transported to the special school in their complex for about half a day, and return to their neighborhood school in the afternoon. The special schools would be integrated so that both quality education and racial heterogeneity would be achieved.[3]

"Planning Quality Education" also called for the adoption of a "Voluntary Open Enrollment" system to replace the limited open enrollment policy already in effect. It had been determined that the limited open enrollment plan had resulted primarily in the transfer of whites to other predominantly white schools and of blacks to other predominantly black schools. The new proposal required that transportation be provided at school district expense, that space be made available at receiving schools and that only transfers which contributed to racial balance would be permitted.

The last major proposal included in "Planning Quality Education" called for the concentration of educational resources in a central-city school to attract students of different ethnic groups to an integrated educational experience.[4]

Gilberts publicized his plan in an hour-long TV broadcast in mid-October. The two co-chairpersons of Citizens for One Community issued a joint statement saying they had heard "...nothing in Gilberts' presentation that would provide racially balanced schools." But they added that the written plan "appears to be more detailed than anything he presented on TV."[5]

Gilberts, according to one close observer, was a bad communicator.

He tended to speak in a monotone and lacked the charisma needed to generate support for his ideas. The result was that the real desegregative potential of his plan was never really considered. Gilberts' plan was attacked by anti-desegregationists in the community as "forcing" racial balance in the schools. Pro-desegregationists opposed it on the grounds that it represented merely a kind of re-shuffling of the status quo without any substantive change. As a result of this hot, but largely uninformed controversy, it is not surprising that the school board proceeded cautiously.[6]

In November it adopted the Voluntary Open Enrollment plan and resolved to put it into operation in January of 1969. The board then turned its attention to altering attendance boundaries in the Park Hill (northeast Denver) area to balance the ethnic distribution of the student populations. The plans to achieve this were formulated by the Superintendent's staff in early 1969. They relied primarily on a satellite zoning concept by which predominantly black attendance areas were to be detached and assigned to white schools in southeast and south-central Denver. A number of white elementary and junior high school students already being transported under the current system would be transferred from Lowry Air Force Base to predominantly black schools. About 3900 students would have been transported under this plan. Of these, 3100 would have been bused by the school district--1890 from predominantly black schools. The program would have affected more than twenty schools and would have resulted in integrated education for some 30,000 students.

After much deliberation and debate three resolutions--1520, 1524, and 1531--were drafted to implement these plans. Thereafter followed a round of televised public hearings on the proposals. These generated a lot of emotional heat and served both to enlighten and intensify the community debate.[7]

The strongest supporters of desegregation represented by Noel and Benton on the school board thought that the three resolutions were a step in the right direction but should be considered no more than a symbolic beginning to comprehensive desegregation. It was this stance which particularly inflamed the "antibusers". They felt that the mandatory transportation components of the three resolutions were already going too far. When Noel stated at a public meeting that her goal was desegregation of the entire city roughly according to the percentage of races in the community at large, their worst fears were confirmed. James C. Perrill, (a former State Senator who later ran for the school board) said, for example, that he is not sure what he would have done had the board intended to limit itself to the three resolutions already adopted. Since this was avowedly not their intention he felt compelled to act.[8]

There was also concern, at least amongst the legally minded, about what one attorney for the defendents termed a "rachet effect": once the board took specific desegregative action it would be difficult to moderate or rescind the new policy without creating a presumption of segregative intent. This presumption might ultimately lead a court to order a desegreation remedy far exceeding in scope anything the school board had enacted or even contemplated in the first place. There was a sense of urgency, therefore, that the "rachet" be stopped before too many notches had clicked by.[9] Passage of the final resolution--1531--which effected the transportation of elementary school pupils, outraged many members of the community and greatly raised the temperature of the debate.

The impending school board elections in May also helped maintain a high level of tension. The terms of two of the five members who had voted for the Noel resolution were to expire. There was a strong sense of immediacy among members of the majority that their efforts culminate in concrete action before the election. The last of the three resolutions was passed in April of 1969. All three were to take effect when school reopened in September. Both of the incumbent board members ran for reelection. One, Ms. Saunders, ran as an independent. The other, Edgar Benton, teamed with another candidate, Monty Pascoe, and were known as the "probusing" candidates. Two others, James C. Perrill and Frank Southworth, also ran as a team and were known as the "antibusing" candidates. Perrill and Southworth won by a margin of about two and a half to one, receiving the largest vote ever cast in a Denver school election.

The board majority was thus shifted. The vote had really only been on one issue--busing. It is therefore understandable that the new members felt they had received a mandate to rescind the three resolutions. This they did over Superintendent Gilberts' opposition as the first formal action of the new board on June 9, 1969. That same evening they adopted Resolution 1533. 1533, drafted by Ben Craig, one of the attorneys retained by the school board, nominally retained the board's explicit policy of promoting desegregation. In practice, however, the resolution provided for only two of the school complexes of Gilberts' plan and the voluntary transfer program. The new attendance boundaries proposal had been eliminated and with it the hope of voluntarily achieving substantial actual desegregation. A complaint and motion for preliminary injunction reinstating the rescinded resolutions were filed in federal court ten days later.[10]

II. The First Round of Proceedings: Hearings on the Motion for Preliminary Injunction.

Prior to the elections, a number of local attorneys as well as NAACP Legal Defense Fund lawyers had been assembling information, cases and legal theory pertinent to possible legal action in Denver. This planning, however, had never reached the stage of actually preparing a specific case. The school board elections catalyzed the legal proceedings which had been brewing for some years previously. A group of Denver lawyers got together on the weekend following the election and began organizing legal theory around factual evidence. The latter was contributed in large part by George Bardwell, a statistician, and Paul White, a doctor. These two were knowledgable about desegregation in general and about the particulars of Denver due to the research they had conducted in connection with testimony for the Gilberts plan. Two Denver attorneys, Robert Connery and Craig Barnes, took primary responsibility of organizing the case at this early stage. Mr. Connery had been active in the Equal Educational Opportunity Fund Inc.--a citizens' group dominated by lawyers interested in promoting desegregation in Denver. Ben Craig had helped organize Monty Pascoe's unsuccessful bid for a seat on the school board. With the rescission of the three resolutions both felt that the opportunity for meaningful political intervention was over and it was time to turn to legal channels. Barnes dropped out of a Ph.D. program in International Studies to make time for his participation in the case.

After Memorial Day weekend they were joined by Gordon Griener, an antitrust lawyer with extensive courtroom experience. Mr. Greiner had begun his career as a Goldwater Republican. The Denver case encouraged the leftward migration of his political views and he soon became a thorough-going desegregationist. Greiner was to play the leading role in both preparation and presentation of the plaintiff's case throughout the long years of litigation. Conrad Harper and Vilma Martinez representing the NAACP Legal Defense Fund also helped pull the case together by contributing their substantial experience with desegregation cases and by offering to defray certain costs such as witness fees, secretarial help and out-of-pocket expenses.

On June 19 a complaint was filed in the United States District Court on behalf of eight parents and their minor school children. Five were black, one Hispano and two white. They claimed to represent all school children attending segregated or substantially segregated schools within the Denver Public School system. A total of fourteen lawyers signed the original complaint including three NAACP attorneys from New York and nine from Denver who were listed "of counsel". Superintendent Gilberts, the school district itself and the school board members in their official capacities were named defendants.[11]

The school board and its lawyers were not surprised that suit was brought though they had not expected the response to be so swift. Lawyers who were to become opposing council in the litigation had been in communication over the desegregation question for some time. For example, Ben Craig who had helped draft the three rescinded resolutions when the pro-desegregation board was still in power, had been confronted one afternoon by Connery representing a committee of thirty attorneys. Connery expressed certain suggestions as to what should be included in those resolutions. (Craig took the views into consideration feeling his job was to protect the school board from potential litigants.)[12]

The complaint contained two causes of action. The first cause contained six counts and dealt with the schools in northeast Denver that had been affected by the three resolutions. The allegations under the first cause claimed essentially that the recision of the three resolutions was an act of de jure segregation and constituted in and of itself a denial of plaintiffs' equal protection rights. Plaintiffs sought preliminary injunctive relief which would enjoin the implementation of Resolution 1533--the resolution passed by the board immediately after the recision of 1520, 1524 and 1531 and which would have returned the district to the policies and practices existing prior to the adoption of the resolutions. They prayed for reinstatement of the status quo represented by the three disputed resolutions. The first cause of action was accompanied by a motion for a temporary restraining order to prevent cancellation of the order for 27 new school buses and the destruction of existing documents and class programs relevant to implementation of the desegregation plan. They also sought to enjoin any action or communication which would obstruct the implementation of the three resolutions. They sought, finally, a declaratory judgment that the recisions were in violation of the 14th Amendment.

The second cause of action originally contained four counts. These were irrelevant to this stage of the proceedings since they alleged illegal segregative actions outside the Park Hill area schools. The primary injunction dealt only with schools in this area.[13]

The decision to bifurcate the legal action into a motion for a preliminary injunction pertaining only to Park Hill and a separate allegation of unconstitutional segregation in the central city schools was crucial for plaintiffs' strategy. It was debated at some lenth with Greiner at first advocating action against the entire system from the outset. The plaintiffs in fact felt they had strong evidence of illegal segregation permeating the entire system and were seeking broad relief. On the other hand, the evidence related to Park Hill often didn't reflect directly on school board policies affecting the rest of the district. The Park Hill events could be wrapped up neatly in the most blatantly segregative act of all--recision of the three resolutions. The lawyers also feared that the board majority would disestablish the preparations for implementation of the resolutions (such as cancelling the order for new buses) that had already been accomplished. Finally, the lawyers felt that obtaining immediate relief for Park Hill had in it an element of moral compulsion. The emotional urgency of wanting to do something concrete right away was probably as important a factor as any in the decision to seek a preliminary injunction.[14]

Four days before the hearings were to begin, counsel for the defendants were served with 75 prepared exhibits and a list of 16 witnesses. At nine o'clock of the night before the hearings began they were served with an additional 45 exhibits and a list of three more witnesses. The exhibits included the three resolutions, the reports of the study committees, large volumes of other school district documents and a large number of maps, charts and diagrams prepared by Doctors Klite and Bardwell. The hearings lasted from July 16-22 and produced about 2000 pages of transcript.[15]

The judge who presided over them, William Doyle, is a native of Denver. He served as Denver's district attorney, University of Denver law professor and member of the Colorado Supreme Court before his appointment to the Federal District Court.[16] By his own admission, Doyle was unaware of any of the school board's practices and policies pointed out by the plaintiffs and was apparently quite skeptical of their claims initially.[17]

During the hearings evidence was presented indicating a long history of segregation in the Park Hill schools. The court found that segregative intent was revealed by teacher assignment policies, new school location decisions, boundary changes, and concentration of blacks in existing schools by expanding those schools or by adding mobile units. (The court found that Resolutions 1520, 1524, and 1531 would have contributed substantially to reverse past segregative trends. "Although this was carried out in response to what was called a voter mandate, there can be no gainsaying the purpose and effect of the action as one designed to segregate" (303 F.Supp. 279, at 285). Judge Doyle granted the preliminary injunction in his opinion and order of July 31, 1969. He granted defendants a ten day stay. They appealed the case immediately.

The unusual feature of the requested injunction is that the status quo plaintiffs sought to reinstate really represented an abrupt new departure in school board policy. The rescinded resolutions had, after all, never been implemented. Plaintiffs were asking for the restoration of a plan, not an actuality. Counsel for the defendants felt that this was a key to their success.

How could the recisions represent injury, let alone the "irreparable injury" Greiner argued was sufficient to support an injunction, when the resolutions were not to be operational until three months after the recisions? Furthermore, Resolution 1533 which replaced the three disputed resolutions was actually an improvement over what had been available the previous Fall because the voluntary open enrollment plan with provided transportation was retained in it. Just because the earlier board had proposed more desegregation than the current one should not be considered grounds for a presumption of segregation intent on the part of the latter--especially since no actual desegregation was being reversed. Here was the "rachet effect" par excellence.

Defending counsel were concerned that opposing attorneys were successfully creating the impression in Doyle's mind that the resolutions were somehow already in effect. They did this, for example, by presenting statistical charts showing what the racial composition in Park Hill schools would be after the resolutions were put into effect and how it reverts to a segregated distribution with their recisions. The crux of defendant's argument on this point was that the office of a preliminary injunction is to preserve the status quo. What plaintiffs were asking for was really a mandatory injunction which, in defending counsels' view, could only be legitimately issued after a full scale trial on the merits.[18] The question as to what the court was being asked to do and what it had the power to do was not directly addressed until the last day of the hearings. It was one of the very few occasions on which Doyle displayed a lack of clarity as to the direction of the proceedings.

> THE COURT: Then what you want is really a mandatory injunction requiring them to carry out 1520, 1524 and 1531?
>
> MR. GREINER: I believe that's correct, Your Honor.
>
> THE COURT: I haven't got the power to do that.
>
> MR. GREINER: Oh, sure, you do.
>
> THE COURT: No, I don't. I have the power to enjoin. And I suppose they can come up with a new resolution, "1550," and if it were constitutional, why, it would be all right. I can't tell them what kind of a plan that they should adopt.

I didn't know you were asking for that in your preliminary injunction, anyhow.

MR. GREINER: We have asked, Your Honor, that the defendants be prevented and restrained from in effect implementing 1533. That's what we asked.

THE COURT: To the extent it voids 1520, 1524 and 1531?

MR. GREINER: That's correct.

THE COURT: So you're asking indirectly for exactly that; a mandatory injunction telling them to carry out these former resolutions.

MR. GREINER: No, Your Honor. If the recisions are voided as being unconstitutional, then the status quo prior to the unconstitutional acts, that is what we seek to have restored. The status quo prior to recision was 1520, 1524 and 1531.

Now, the Seventh Circuit in Westinghouse Electric Corporation against Free Sewing Maching Company, 256 Federal 2d, 806, a 1958 case, defined the status quo as the last uncontested status which preceded the pending controversy. And that has got to be the context of this case; 1520, 1524 and 1531.

THE COURT: I would suggest to you that the extent of the Court's power would be to enjoin any acts on the part of the School Board which would perpetuate any invidious discrimination found to exist. I think that's the extent of the Court's power.

MR. GREINER: Well, the Court has the power to --

THE COURT: I mean, the Constitution certainly does give the Court a certain jurisdiction. But you are in here asking for temporary injunctive relief, with the "temporary" underlined. The understanding was that the merits of this case would be tried at some later time; next fall. And that the object of this was not to get a decision on the ultimate merits, but to maintain some status quo.

Now I'll ask you this. What kind of status quo do you want to maintain?

MR. GREINER: 1520, 1524 and 1531, Your Honor.

THE COURT: Well then, what you want is temporarily to require them to carry out these early policies.

MR. GREINER: We want the Court to give effect to the voidness of these recisions as being unconstitutional.

Your Honor, we had a hearing on this question on June 27th.

THE COURT: True. I've got the transcript of it.

MR. GREINER: Right. At page 10 of that transcript, Your Honor, there is colloquy between the Court and Mr. Creighton and --

MR. CREIGHTON: I believe that was a conference, Your Honor.

THE COURT: I beg your pardon?

MR. CREIGHTON: Was that a conference we had?

THE COURT: What date was it?

MR. GREINER: June 27, 1969. It was in open court, Your Honor. The issue at that hearing was which portions of our motion for a preliminary injunction the defendants would agree to. And they stated that they could not agree to subparagraph C because -- and I am quoting -- "This in effect would enjoin us in effect from carrying out the present resolution." And that's what this hearing is all about, Your Honor.

THE COURT: Well, I think that, assuming that you have merit to your case, an order which draws up a plan or specified a plan which had to be employed, would have very doubtful validity.

MR. GREINER: Well, the plans -- the ones drawn up by the School Board itself --

THE COURT: But, he says --

MR. GREINER: -- and passed by the School District itself and rescinded, Your Honor, for no lawfully recognizable --

THE COURT: I'll ask you about that, too. What significance do you think this recision has? I wish you would focus on that and relate it to your theory of the case, the recision itself.

MR. GREINER: The recision, Your Honor --

THE COURT: This is an important aspect to your case; the fact that it was intentionally or knowingly rescinded.

MR. GREINER: Certainly. If this case is unique, Your Honor, it's unique because since Brown against Board of Education this is the first instance of which I am aware where a northern school board or a southern school board, so far as that's concerned, has taken affirmative action to integrate the schools and then rescinded it. It's the ultimate gerrymander, and gerrymandering, whether in the North or the South, has been held unconstitutional per se since Brown. That's the teaching of the New Rochelle case.

What they did when they rescinded under the resolutions, for example, the attendance areas of Barrett had been redrawn and split into about six different pieces and each one of those pieces had been assigned to a particular receiving school. Then when they rescinded, Your Honor, they redrew the boundaries of Barrett and by redrawing it, made Barrett a segregated school; the ultimate gerrymander.

The same thing happened at Smiley.

THE COURT: The only thing I can say to you, Mr. Greiner, is that if what you request is granted, the lawsuit is all over. No point in having a hearing next fall or any other time. You will have prevailed, and there is nothing else to try. Because I will have found all the disputed facts and all the disputed law in your favor. That's what you want, I am sure.

MR. GREINER: That's exactly what happened in the Cook County case, Your Honor, on a motion for preliminary injunction.

THE COURT: Well, that, of course, isn't what we had been led to understand was going to happen here. We thought we were going to try it on a temporary order. So, anyway, we know what your position is. Now, unless you've got something to add, why --

MR. CRAIG: I would just be restating what I said before, Your Honor.

Doyle took the case under advisement and the Rocky Mountain News ran a three column story the next morning with the headlines: "Judge 'Powerless' to Force Busing Plan."[20] Whatever hopes all this nurtured in the hearts of the defendants were dashed later on that same day when Doyle announced his ruling from the bench. He did indeed resolve all disputed facts and law in favor of the plaintiffs. It is not entirely clear what Doyle's reasoning was in changing his mind about the appropriateness of enjoining adoption of the repealed resolutions. The initial decision was that of determining what the "status quo" really was. This he does in unequivocal terms: "It is true that the case is extraordinary in that there are only two plans presented, one calling for integration and one for segregation. The status quo has the effect of restoring the integration plan." (303 F.Supp 279 at 288). The alternative interpretation would, after all, have been far more extraordinary. It would have meant that the requested injunction could have been granted or denied and school board policies would have been unaffected either way. As Gordon Greiner put it: "1533 is merely a continuance of an unconstitutional act and as premised on the constitutional acts of recision of it, would be fruitless to declare the recisions unconstitutional and then allow 1533 whose heart and soul is the recisions themselves to continue in force."[21]

Doyle's difficulty in determining what the law requires at this junction can be understood in light of his extremely conservative view of what the court's legitimate powers really are. He expresses this conservatism many ways throughout the years of Keyes litigation but nowhere more clearly than at this point:

> MR. GREINER: If you wish briefs submitted on the Court's power to mandatorily enjoin, we would be happy to submit them.
>
> THE COURT: Well, I suppose you could find plenty of cases where mandatory injunctions are proper. And, if you had a recalcitrant school board, I suppose -- I mean, who wouldn't respond to a negative type injunction, I expect we would have the power to force them. As in -- to force the legislature -- as you do in a voting case. It can be done. But on a preliminary injunction why, we don't usually go to that length. That's what I'm suggesting to you. You weigh it; it's an exercise of power. I mean, you don't take advantage of every possible occasion to use it.
>
> This is the philosophy of federal courts, in case you don't know it. I am sure you do. Justice Frankfurter said, it's a judicial species and it becomes highly inflated as you exercise this power willy-nilly. That you use it with some restraint. And you measure your decree in a way that will accomplish the results without vulgarly displaying the power or pressing the other parties unduly.
>
> MR. GREINER: It's extraordinary relief to be used in extraordinary cases and --
>
> THE COURT: Precisely.
>
> MR. GREINER: -- and this is an extraordinary case, Your Honor.
>
> THE COURT: Anything further, gentlemen?
>
> If not, the matter will stand submitted and we will take a look at the exhibits and render a decision as soon as possible.[22]

Another theme which emerged shortly after these words were spoken is that of the sanctity of the law--a conviction of almost religious power in Doyle. The judge speaks softly and almost mumbles at times. When aroused, however, he can give his delivery a truly intimidating volume and clarity:

> THE COURT: Oh, the evidence shows that they have voted upon the basis of voter mandate. Isn't that right? What they expressed was a mandate from the voters.

> MR. CRAIG: I'm not sure I could say that, Your Honor.
>
> THE COURT: Well, I thought that I read that in either 1533 or one of the minutes.
>
> MR. CRAIG: I think the minutes speak for themselves on that.[23]

At this point Doyle drew himself up to full height, leaned over the bench and said in strident, almost contentious tones:[24]

> THE COURT: So of course I think that you lawyers at least understand that the shape of the constitution is not dependent upon the way the people vote. That's been made clear many, many times by the Supreme Court. They can't amend the constitution by voting in public officials or voting some policy. If so, I expect that there wouldn't have been any integration in the South at all because I expect that the majority of voters would have always prevented anything meaningful.
>
> So, I expect that the voice of the people is entitled to some consideration, but if it's in conflict with the Constitution of the United States, it's not going to carry any weight. It can't, in a court of law. The law is something else. I am sure you don't dispute that, Mr. Craig, do you? The Constitution is going to prevail.
>
> MR. CRAIG: Oh, yes, sir.
>
> THE COURT: And the shape of the Constitution isn't determined by popular vote at every election, is it?
>
> MR. CRAIG: No.[25]

Whereupon the hearing ended.

His remark that "...the voice of the people is entitled to some consideration" may sound gratuitous in this context. It is not. Doyle is concerned with upholding the law's uncompromised requirements. At the same time he is anxious that the Court not exceed its rightful bounds and impinge unjustifiably on "the voice of the people." His reluctance to impose what amounts to a mandatory injunction is a case in point.

Another feature of Doyle's judicial style is his straightforwardness in calling things as he sees them. This is illustrated on the first day of the hearings when plaintiffs suggest he can impose mandatory busing without actually ordering it per se:

> MR. GREINER: Your Honor, there is a point which I think should be clearly set out, and that is the three resolutions which we're talking about do not in and of themselves provide for mandatory bussing. What the source of the mandatory springs from is another policy of the School Board which has always been in effect and which was not rescinded, and that is, that a student who lives more than a certain distance from his assigned school will be provided transportation.
>
> THE COURT: So you're saying that a decree does not demand that you commit yourself to mandatory bussing even though that will be the effect?
>
> MR. GREINER: That's correct, Your Honor. And as I understood counsel's remarks --
>
> THE COURT: All you commit yourself to is boundary changes that result in --
>
> MR. GREINER: -- in new schools.
>
> THE COURT: But the practical effect -- Let us say, and you can't escape from it and you shouldn't try to, will be mandatory transportation in order to carry out as you say an underlying policy of the Board to transport children where there is a certain distance involved. Isn't that right?
>
> MR. GREINER: I think that's correct, but I'm not sure --
>
> THE COURT: So I don't think we ought to hide our heads to any of the facts. We ought to confront them all face to face and not call them anything different than they are. If this is going to be a consequence, it ought to be pointed out and ought to be in the decree. There is no sense in using any legal verbage to cover up. I'm not going to do it.
>
> MR. GREINER: That's fine with me, Your Honor.[26]

The Court filed its written opinion on August 1. Defendants responded immediately by filing simultaneously a notice of appeal and motion for stay pending appeal by the 10th Circuit Court. The motion for stay was argued on the morning of August 5. That afternoon the Court of Appeal called to request more argument on the effect of Section 407(a) of the 1964 Civil Rights Act. This section provides that:

> ...nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

The Appeal Court was not satisfied that enjoining the resolutions was not an instance of "racial balancing" proscribed by the 1964 statute. It remanded the case to determine the applicability of the law to the case. The Circuit Court judges themselves expressed no opinion on this question stating merely that they "...declined to consider and determine a question of such importance as this application for a stay on the basis of the record presented to us."[27]

On August 6, the day after the remand was issued, District Court hearings began on the applicability of Section 407(a). Briefs were filed and the District Court issued its supplemental findings and opinions on August 14 holding Section 407(a) inapplicable to the case at hand (303 F. Supp 289, at 299). The provision was found to pertain only to cases of de facto segregation. Once a court finds that de jure segregation exists it is required to insure compliance with the Constitution.

In addition to the Civil Rights Act question the Court of Appeal had remanded on the grounds that the preliminary injunction lacked the requisite "specificity". Indeed, when granting the preliminary injunction the District Court wrote: "In determining that the plaintiffs were entitled to the preliminary relief sought, we are not to be understood as holding that Resolutions 1520, 1524 and 1531 are exclusive," and "...the Board is by no means precluded from adopting some other plan embodying the underlying principles of Resolutions 1520, 1524 and 1531." (303 F.Supp at 288) In its supplemental findings, conclusion and preliminary injunction of August 14, however, the Court, in order to meet the specificity requirement, listed the paragraphs of the various resolutions which were to be implemented by the Board. It is ironic that as a result of the appeal, the school board got an order which probably allowed them fewer discretionary options than the original injunction.

From the defendants' point of view the only bright spot was that East High School and Cole Elementary were excluded from the injunction. Cole was predominantly black but the disputed resolutions would not significantly alter the school's racial composition.[28] It may have been a response to the 10th Circuit Court's restricted interpretation of the law that Doyle was careful after the first remand not to include anything but perfectly clear-cut cases of illegal segregation in his injunction.

Defendants immediately requested another stay from the Circuit Court pending the decision on the appeal itself. The Appeal Court, ignoring the weight of the finding of illegal segregation, granted this stay at 5:00 P.M. on the Wednesday preceding Labor Day weekend. School was to open that upcoming Tuesday.[29] Attorneys for the plaintiffs had been very concerned about the possibility of the schools opening before implementation of the injunction. They had feared that once this occurred it would be far more difficult to effect the mandated changes both as a practical and as a legal matter. They prepared themselves for this eventuality by writing an appeal to the Supreme Court before the Circuit Court issued its stay. All they had to do was edit it to address specifically the language of the Circuit Court opinion.[30]

At 8:00 P.M. that same Wednesday evening defendants were served with a motion in the Supreme Court of the United States to vacate the stay and reinstate the preliminary injunction. It was addressed to Justice Byron R. White. Counsel for the defense left for Washington, D.C. forthwith to file a response opposing this motion. Justice White normally hears cases from the 10th Circuit but he was in Colorado on a trout fishing vacation so the case was assigned to Justice Brennan instead. The justice declined to hear oral argument.[31] The next morning, Friday, August 29, the Supreme Court issued its three-page opinion granting the motion for vacation of stay and reinstating the preliminary injunction. Brennan held that a District Court order "...granting or denying a preliminary injunction should not be disturbed by a reviewing court unless it appears that the action taken on the injunction was an abuse of discretion." (396 U.S. 1215 at 1216). Since the Appeal Court never suggested that the lower court had abused its discretion, the stay of the injunction was improper.

Neither party to the dispute was giving anything away. Defendants now asked the court of appeal to rewrite its order of August 27 to correct for the deficiency pointed out by Brennan--that the Appeal Court had not specifically found an abuse of discretion on the part of the District Court.[32]

The Circuit Court's strongly-worded opinion filed on September 15 in response to this motion again illustrates its conservative view of the law.

> "The record before us at the time of our order showed that Colorado has not, and never has had, any state imposed school or residential segregation. No discrimination in school transfers was either shown or claimed. No gerrymandering was shown or claimed. The district court's findings of de jure segregation, or a dual system, were confined to a small number of schools and were based on the failure or refusal of the School Board to anticipate population migration and to adjust school attendance districts to alleviate the imbalance resulting from such population shifts."[33]

But by this time school had already started, the injunction had been implemented, and the opinion concluded that the public interest would best be served by denying the motion and holding the appeal in abeyance until after a full trial on the merits.

The alacrity with which the various courts reviewed the case and issued their orders and opinions was truly phenomenal. It can be attributed, in part at least, to the urgency both sides of the conflict felt about getting the injunction question resolved before school opened. Since each party was convinced the law was on their side and that they would ultimately prevail, each perceived it to be to their advantage to obtain a resolution before school opened. At first the school board claimed that it had to have an order by July 30 so that any adjustments in school policy could be carried out before school began. After its first failure in district court it extended its deadline to the middle of August so that there would be time to appeal to the Circuit Court. Each time it lost an appeal the deadline was pushed further back. The courts, however, seem to have taken the pleas for swiftness at face value and responded accordingly.

At times victory appeared to lie in the hands of the lawyers who could work at the most fiendish pace. On August 27, when the appeal court issued its stay of the preliminary injunction, plaintiff's attorneys had taken the afternoon off to go fishing. They heard of the ruling over the radio and returned immediately to Denver. That very night Robert Connery was on a plane to Washington with the preprepared appeal to the Supreme Court. The others made the necessary revisions addressing the specific language of the Circuit Court and dictated the updated version of the motion to Mr. Connery over the phone upon his arrival in Washington.[34] This resourcefulness is what enabled plaintiffs to have the last word in their favor before school opened.

III. The Trial on the Merits and Hearings on Remedies

On September 26 defendants secured the services of a well known Denver trial lawyer, Kenneth Wormwood, in preparation for the upcoming trial on the merits. In the middle of October plaintiffs served their first motion for the production of documents. It included calls for an estimated eight to eleven million raw test scores of Denver pupils. Plaintiffs' first set of interrogatories arrived two days later with 300 questions requiring about 90,000 separate answers. There was a pretrial conference on November 25 and a trial date set for January 5, 1970. On the 1st, however, Mr. Wormwood died of a heart attack. Defendants hired another prominent Denver lawyer, Mr. Ris, and received a continuance of the trial until February 2.

The trial on the merits was held from February 2-20 and included fourteen trial days. It generated about 2,250 pages of testimony and several hundred exhibits. On the first day Doyle ruled that no evidence introduced at the preliminary hearings could be presented again at the trial.[35]

Plaintiffs had filed two separate claims. Under the first the Court had to establish the scope and permanence of the preliminary injunction. The second claim alleged illegal segregation in the so-called "core-city" (non-Park Hill) schools on three separate counts:

1. Plaintiffs alleged that through boundary changes, school construction and location policies and the neighborhood schools policy itself, the defendant school board intentionally segregated the core-area schools.

2. The second count alleged that 27 schools in the district provided inferior educational opportunities in violation of the equal protection clause, and that the minority racial composition in these schools was the primary cause of their inferior offerings.

3. The final count of the plaintiffs' second claim for relief attacked the neighborhood schools' policy as unconstitutional whether or not motivated by legitimate factors because it did in fact result in racially segregated schools.[36]

Plaintiffs discovered in research carried out since the filing of the original complaint that they could not convincingly demonstrate that the teaching system employed by the district caused segregation within the classroom. Thus, their fourth count of the second claim was therefore abandoned before the trial.[37]

On the third day of the trial Theodore White, Jr., Director of Special Education for the Denver Public Schools, was called upon as witness for the plaintiffs to testify on the segregative effects of the special education program. This is not an issue which had been specifically addressed in the complaint or pretrial conference and defendants objected to it being raised. Doyle was taken completely by surprise as he had received no notice of special education being an issue in the case. He had to decide whether a hearing on special education is procedurally appropriate at this late time and whether it had sufficient substantive relevance to the other counts that plaintiffs should be permitted to plead on this point.

Mr. Barnes feels that the judge simply didn't want to hear it, that the case was complex enough without yet another can of worms to open and that, in refusing to hear this line of argument, Doyle was simply trying to protect himself from legal overload. Doyle's initial response supports this interpretation to some extent. He did not want the waters muddied by general attacks on school system practices not directly related to issues already put before the court. At the same time he is unwilling to dismiss the matter out of hand just because the point had not been properly raised.

THE COURT: Is this witness going to say that this program isn't any good?

MR. BARNES: No, I hope --

THE COURT: It is his program, isn't it?

MR. BARNES: That's correct, Your Honor. I hope to demonstrate --

THE COURT: I wouldn't expect him to. What do you hope to glean then from what he has to say? It isn't any good?

MR. BARNES: We have to establish how it works and in what ways a child is placed in a special education --

THE COURT: It seems to me we have enough to do here without reaching out into this area that hasn't even been defined as an issue in the case, unless you are trying to show that they are or that this is a similar offense, so to speak, whereby they are either, A, incompetent, or, B, malicious. Is that what you are trying to do?

MR. BARNES: It has effects that are not fully comprehended by the District, that's true, in that sense. Maybe incompetent is too strong a word, but it has segretory effects which are decisive for some 1800 children and permanent in the average case. Those children, once they land in this classification --

THE COURT: Has this issue ever been defined in the pretrial order?

MR. JACKSON: No, Your Honor.

MR. BARNES: This was --

THE COURT: I will hear you on this, if you wish, if you want to argue it, but I just don't see that it is going to be helpful to have you put in every deficiency in the school system that you have been able to discover. I just don't see the value of this. I think we ought to try this case on as scientific a basis as we can, treating the issues that have been developed, have been set forth. I just don't see the value of putting in everything, including the kitchen sink, just to make a bad picture. You know, it doesn't impress me. It is a waste.[38]

After giving plaintiffs an opportunity to outline their argument and the relief they plan to ask for, Doyle again appears to dismiss the special education issue:

> THE COURT: Go on, I haven't heard anything yet that is persuasive. I mean, from our standpoint. Surely, it is a problem, but as I say, we are zeroing in on these minority -- on invalid classifications, contrary to the Constitution of the United States, intentional invalidment.
>
> MR. BARNES: In our complaint, Your Honor --
>
> THE COURT: So, now you are bringing in one there has been no notice of.
>
> MR. BARNES: That's not entirely accurate. This came to evidence -- it came to light --
>
> THE COURT: You have not defined it at any pretrial conference we have had. This is complete news to me.
>
> MR. BARNES: It came to light after the pretrial order was drafted.
>
> THE COURT: Then, you should have called attention to it, specifically, giving the other side an opportunity to prepare for it.
>
> MR. BARNES: They were present at the taking of Mr. White's deposition and given a resume of the expected testimony.
>
> THE COURT: Well, the objection is sustained. I think this is incompetent and irrelevant. It doesn't go to the issues that have been defined. You have got your records. You have made your offer, but I just don't see that we are justified in taking on this new problem in this case.[39]

Doyle is still unsatisfied that the question is without relevance and questions both Mr. Barnes and the witness as to the relationship between the special education program and segregation. He then dismisses it once again:

> THE COURT: Well, I honestly think from what you tell me that this is undoubtedly a problem. But, I don't think that it's a problem that we can deal with in this case. That's all. Because, I don't see that it is the kind of a constitutional violation at which you are complaining. Undoubtedly it may call for a new approach, or could. But, I just think it falls short as a complaint in this case, quite apart from the fact that you have not lined it out. You're bringing it in today really for the first time as a defined issue and I think frankly that the purpose it serves is just an added indictment of yours of the school system, in aid of the rest of your case. That's what I think you're offering it for.
>
> MR. BARNES: We would request the relief -- the specific relief that goes to the --
>
> THE COURT: I'm just going to have to deny it on this occasion. If you wish to file a new lawsuit, you may do so, of course.[40]

The Court and attorneys then confer in chambers. Doyle says:

> Well, I just don't know what the heck you're trying to do here to us, that's the thing. I mean, I'm a patient man and I want to receive everything liberally, but I don't want you to conduct an experiment here because we are geared to do this job, don't you see. And I just think it's an imposition on us to crank up a brand new issue and try to unwind it.
>
> You may have a nice theory here about preliminary education. Maybe that's the way to solve this problem. I don't know. But, to bring it in here as part of --[41]

The issue is hashed over again. Mr. Greiner has given up the attempt to include the special education complaint in the trial and was now concerned with the scheduling of witnesses. At this point the judge reopens the discussion on the legal merits of Denver's special education program:

> MR. GREINER: Well, the Court has ruled and I'm not going to argue the matter any further. I think our problem is where do we go from here. We will not be ready with Dr. Bardwell until tomorrow morning. That's the plain fact. Kay Schomp is here and we can put her on, but that will only take I would say about thirty minutes.

> MR. BARNES: At the most.
>
> MR. GREINER: I'm very sorry. We had no idea that the defendants were going to make this tack. If we had been given some notice we would have had Dr. Bardwell here and ready. And, I think it's a mistake, but the Court has ruled.
>
> THE COURT: As I understand it, it's the policy of not having a preschool Head Start type program generally which works to the special disadvantage of the disadvantaged group, these culturally deprived groups. That's your contention?[42]

There follows three and a half pages of transcript in which Mr. Greiner offers the clearest defense of the complaint heard yet. For the last time Doyle restates his position and rules the question out.

These passages provide evidence of the open-mindedness and patience both sides of the dispute have attributed to Doyle. They also show the judge attempting to fulfill a kind of "quality control" function. He is concerned about maintaining a certain tight order and logic in the proceedings--what he terms a "scientific basis." This is not limited to a concern for procedural nicety but attempts also to evaluate the relevance of an argument in terms of its relationship to the main features of the case as a whole.

Another point which Doyle raised repeatedly throughout the trial is the danger of impinging on political processes. This is related to the problem of whether the preliminary order should take the form of a mandatory injunction. Doyle was highly conscious of the balancing act he had to perform on the high wire of jurisprudence. On one side lay failure to uphold the full requirements of the Constitution; on the other lay the encroachment of judicial fiat on decisions rightfully included within the ambit of political processes. An exchange during the testimony of James Perrill, the recently elected antibusing School Board member illustrates Doyle's position:

Q: Now, you made repeated reference to community acceptance. What is the significance of that in your thinking, Mr. Perrill?

A: Well, I think it means something special in this community; where people have control over their public institutions, the leadership of which is selected by the election process. If you don't have community acceptance for the policies and thrust of your elected officials, then they are going to be replaced, and this is rather a basic part of our political structure.

THE COURT: There is no problem on that score. Everybody understands and appreciates this. It's only, I suppose when a problem gets in a constitutional area that this matter changes, so long as it's a political question -- and the Supreme Court made this very clear prior to and subsequent to the Brown against School Board. And before Brown it was always a political question. It was always subject to vote of the people. Isn't that right, Mr. Perrill?

THE WITNESS: I don't know.

THE COURT: These problems were all subject to consent of the governed before they assumed any constitutional law status.

THE WITNESS: Oh, I think -- I think you're right as a general proposition. I suppose, if a district were unwilling to provide equal though separate facilities there would be a constitutional question, because that was a law prior to Brown.

THE COURT: Yes.

THE WITNESS: And I think there may have been some instances of that, but there wasn't enough political power to be generated --

THE COURT: Up to that point the Supreme Court wouldn't even refer this kind of question because they said it was political. You recall that, I'm sure, from your training in law school. But since then, of course, the Court has said that it's a legal or constitutional law question rather than political question and is subject to court attention. Otherwise, we wouldn't even be butting in. And it isn't anything we enjoy, I can assure you. I mean, it's something that has to be done. I guess you understand that, don't you? We're together on this?

> THE WITNESS: You have to try the lawsuit.
>
> THE COURT: That's right. We do our duty as we see it. That's all. We're not -- I mean I think it ought to be made clear, and I don't think that the indications or inferences should be drawn that a court is butting into a political question that is subject to the will of the people, you know, or trying to. And I am sure you agree.
>
> MR. RIS: I'm sure the Court does not relish any thought of having to do so.
>
> THE COURT: Well, it doesn't do it. We're not going to second guess any administrative board on a purely political question. We don't even have jurisdiction to do so.[43]

The Court entered its findings and opinions on March 21, 1970. With respect to the first claim the court affirmed its opinion pursuant to hearings on the preliminary injunction that the Parks Hill schools affected by Resolutions 1520, 1524 and 1531 were in fact subject to unconstitutional segregation in the form of gerrymandering, construction, majority-to-minority transfers and the use of mobile classroom units. The Court, in effect, made permanent the preliminary injunction to remedy these violations. In addition, it found that the illegal activities extended to East High and Cole Junior High Schools.

East had a rapidly growing minority enrollment. Resolution 1520 was designed to prevent it from becoming legally segregated in the near future. The recision was therefore an attempt to thwart the administration of "preventive justice." (313 F. Supp. 61 at 67)

The recision of 1524 in its effect on Cole was also ruled illegal, and for more interesting reasons:

> Even though the racial composition at Cole Junior High School was not significantly changed by Resolution 1524, the Resolution did reduce the pupil membership at that school by 275 students. The purpose of this change was to decrease the pupil-teacher ratio at Cole and to make room for a number of special programs to be instituted there. This was also a good faith effort by the Board to improve the quality of education at the predominantly Negro Cole. The action of the Board in aborting and frustrating this effort cannot stand.
>
> We conclude then that the effect of the rescission of Resolution 1520 at East High was to allow the trend toward segregation at East to continue unabated. The rescission of Resolution 1524 as applied to Cole Junior High was an action taken which had the effect of frustrating an effort at Cole which at least constituted a start toward ultimate improvement in the quality of the educational effort there. It perhaps looked to ultimate desegregation. We must hold then that this frustration of the Board plan which had for its purpose relief of the effects of segregation at Cole was unlawful.

Inferior educational quality is thus causally linked in Doyle's interpretation to segregation itself even though, as the opinion makes clear, the segregation at Cole was strictly de facto (313 F. Supp. 61 at 75).

As to the second claim on the first count, the District Court rejected the contention that the core-area schools were intentionally segregated. Each allegation of segregative intent was measured against a stringent set of standards for determining illegal segregation in the 10th Circuit. The Court stated that:

> In examining the boundary changes and removal of optional zones in connection with the several schools which are discussed above, we do not find any wilful or malicious actions on the part of the Board or the administration (in relationship to elementary schools). As to these schools, the result is about the same as it would have been had the administration pursued discriminatory policies, since the Negroes and, to an extent the Hispanos as well,

> always seem to end up in isolation. The substantial factor in this condition is twofold: First, a failure on the part of the Board or of the administration to take any action having an integrating effect, and secondly, deeply established housing patterns which have existed for a long period of time and which have been taken for granted.
>
> It should also be kept in mind that prior to Brown v. Board of Education, supra, it was apparently taken for granted by everybody that the status quo, as far as the Negroes were concerned, should not be disturbed because this was the desire of the majority of the community. Time and again the Board members testified to the fact that in making decisions they held hearings and finally bowed to the community sentiment. Thus, they say they did not intend to segregate or refuse to integrate. They just found the consensus and followed it. (313 F. Supp. 61 at 73)

It conceded that the School Board had taken a "negative approach" of inaction and had engaged in "eye-closing and head burying," but that this (citing Downs and Dowell) is not the kind of conduct meeting the criteria of unconstitutional segregation in the 10th Circuit (313 F. Supp. 61 at 76).

The third count of the second claim--that a neighborhood schools policy is unlawful if it results in segregation regardless of school board motives--was also rejected. Downs and Dowell are again cited as the controlling cases.

> Plaintiffs' argument in essence is that the neighborhood school system is unconstitutional if it produces segregation in fact. We recognize that some courts have moved along this line.[19] However, the law in our Circuit, as enunciated in Downs and Dowell, supra, is that a neighborhood school policy, even if it produces concentration, is not per se unlawful if:
>
>> it is carried out in good faith and is not used as a mask to further and perpetuate racial discrimination. Board of Education, etc. v. Dowell, 375 F.2d 158, 166 (10th Cir. 1967).

> The United States Supreme Court has not yet ruled on this question, and we are here subject to the strong pronouncements of our Circuit Court. Under these decisions plaintiffs are not entitled to relief merely upon proof that _de facto_ segregation exists at certain schools within the School District.[20] (313 F. Supp. 61 at 76)

Footnote 20 marked at the end of this passage reads:

> There is no discernible difference in result between the _de facto_ and _de jure_ varieties. Both produce the same obnoxious results, but the Supreme Court has so far given its attention to the more serious problem of dual schools.

That Doyle found this necessary to point out perhaps gives an indication of where his personal sympathies lay and how he would like to have ruled had he felt the law permitted it.

On the second count of the second claim he did find grounds for concluding unconstitutional practices on the part of the board. Ironically, the legal theory he relied on is at once the most conservative and innovative advanced by plaintiffs.

The second count claimed that unequal educational opportunities were being offered at 28 Denver schools. These schools had the highest concentration of minority students in the district. Two different lines of argument were declared in support of the contention that these schools have inferior educational offerings.

The first is that (a) achievement is measured by standardized tests was lower; (b) less experienced teachers were assigned to these schools; (c) teacher turnover rates were higher; (d) student dropout rates were higher;

and (e) these schools had older buildings and smaller sites. The high teacher turnover rates resulted in a disproportionate number of less experienced teachers staying at the schools as the more experienced ones used their seniority privileges to transfer out. For practical purposes then, the "teacher experience" and "teacher turnover" problems collapse into the same complaint. The buildings complaint is not dismissed, but only a minor role is attributed to it in producing the overall inferior education. (313 F. Supp. 61 at 81). (Mr. Barnes related that the plaintiffs had a harder time getting evidence of inferior equipment, etc. than they had anticipated.)[44] The remaining two factors--pupil dropout rates and achievement scores--are educational "output" measures. It is upon these, particularly the latter, that the Court relies most heavily in concluding the existence of unequal educational opportunities.

The second line of argument advanced by the Court with respect to the unequal educational opportunity count is that separate is inherently unequal. The Court cites the findings of Dr. Dodson, Professor of Education at New York University. Dr. Dodson testified on behalf of plaintiffs at the trial that the general community has low expectations of, and low regard for, segregated schools. Since these schools are looked on as being inferior, the motivation of teachers, parents and students tends to be low. Thus segregated schools become actually inferior (313 F. Supp. 61 at 81). The legal implications of this argument have their roots in Brown. Plaintiffs were essentially advancing a new, broadened interpretation of the 1954 decision that would obliterate the distinction between de jure and de facto segregation. The District Court, however, shies away from using this as the basis for its ruling:

> Today, a school board is not constitutionally required to integrate schools which have become segregated because of the effect of racial housing patterns on the neighborhood school system. However, if the school board chooses not to take positive steps to alleviate de facto segregation, it must at a minimum insure that its schools offer an equal educational opportunity. (313 F. Supp. 64 at 83)

Rather than attempt to establish the law in this area, the Court relied instead on the old Plessy doctrine of "separate but equal" --but with a twist. The main evidence of unequal educational opportunity was an output measure (test scores). This innovative equal protection theory was thus based on the most conservative of doctrines.

This reasoning may indicate something about Doyle's legal style and about his role as he perceived it. He rejected the more usual kinds of proofs used to demonstrate de jure segregation on the grounds that the impact of school board policies on current conditions had not been well enough developed to be admissible under 10th Circuit case law. He then concluded that illegal segregation nevertheless exists independently from any "intent" on the part of the school board. This perhaps illustrates what one observer of the litigation sees as Doyle's two sides--caution and boldness.[45] He was very careful to confine the exercise of judicial power to its appropriate scope and did not venture a more liberal interpretation of the relevant law than that laid down by the appeal court for the 10th Circuit. As Ed Benton, a former school board member-attorney and close observer of the litigation put it: "Doyle does not see his role as that of remaking the order."[46] On the other hand, when he feels the law supports it, he is willing to advance a new legal theory that is at once novel and traditional. These two sides of Doyle may also be reflected in his courtroom manners. He is a careful listener and is at times an active participant in the argument and questioning but is in general unassuming. His voice is often so low as to be barely audible, yet when the occasion required it he delivered thunderbolts from the bench.[47]

Plaintiffs had urged that the standard for defining racial concentration be based on the percentage of minority enrollments in individual schools where "minority" included both blacks and Hispanos. This Doyle was reluctant to do, writing:

> One of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination. However, whether it is permissible to add the numbers of the two groups together and lump them into a single minority category for purposes of classification as a segregated school remains a problem and a question. (313 F. Supp. 61 at 69)

Without elaborating further he tentatively adopted the standard that minority concentration resulting in unequal educational opportunity occurs in schools with enrollments of 75% (or higher) of either blacks or Hispanos. This reduced the number of schools eligible for Constitutional remedy from the 25 urged by plaintiffs to 15.

Both plaintiffs and defendants were ordered to submit remedial plans. Court was adjourned until May 11, 1970, the first of four days of hearings on remedial plans. The main question to be determined at these hearings was how much relative emphasis should be placed on compensatory education and how much on desegregation as the method for restoring equality of educational opportunity. Since, as Doyle pointed out in his discussion of remedies in his March 21st opinion: "There is a dearth of law in connection with the remedy applicable to equalizing the educational opportunity...,"[48] the Court had a major task before it in determining what effects the various strategies proposed by the litigants would have on educational quality. Needless to say, this process depended heavily on the testimony of expert witnesses. The first was Dr. James Coleman.

Dr. Coleman was called to testify on behalf of the plaintiffs about some of the findings of the Equality of Educational Opportunity study he carried out pursuant to provisions of the Civil Rights Act of 1964. The major point he made was that the social composition of a student body will have a greater effect on the performance of the individual child than the explicit educational resources offered by the school. Judge Doyle took an active role in examining Dr. Coleman:

> [40] THE COURT: Well, you said that was what determined the inferiority of the schools, that is, whether or not they had a large number of white middle-class students.
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Isn't that what you said?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: So it follows that, if our culturally and economically deprived are in the minority, why, then the school itself is going to be an inferior one.
>
> THE WITNESS: Yes, sir. That would certainly be the conclusion.
>
> THE COURT: And I take it that you're saying that the quality of the educational effort is not going to make very much difference.
>
> THE WITNESS: What I'm saying is that inferiority of that school is for, let's say, for example, for a hypothetical child whose school is a predominantly lower-class black school, for example, or predominantly middle-class school, that his educational experience will be very much

> a function of that social composition of the school more than of the explicit resources which the school has put into the system. In other words, I think that's what you just indicated.
>
> THE COURT: So you're spinning your wheels trying to improve these schools and thus improve the educational [41] experience of the child in them by programs of this kind?
>
> THE WITNESS: Yes, sir.[49]

A few minutes later the judge is disturbed by some of the implications he sees in Coleman's testimony:

> THE COURT: The thing that worries me about all this is that what you say is that the schools are not inferior as counsel proved at the trial, but that the students are inferior. They proved it overwhelmingly that the schools were inferior; their offerings were inferior. Now, in coming up with a new tack--it's not the schools at all, it's the students and their economic and cultural deprivation that makes the educational experience one that is noncompetitive. It's dull; not exciting. I mean, I get that from what you're saying. Sort of a self-defeating proposition. They proved the constitution was violated and now they are unproving it.
>
> MR. GREINER: Your Honor, what we're trying to avoid is a duplication of the testimony that the Court has already received. We could go into teacher attitudes, teacher [53] experience.
>
> THE COURT: Well, he says it is of no consequence.
>
> THE WITNESS: I'm sorry, I didn't mean to say--
>
> THE COURT: You said these programs were worthless. I'm exaggerating a little bit to make my point. Isn't that what you're saying?
>
> THE WITNESS: No, what I am saying--
>
> THE COURT: Virtually worthless?
>
> THE WITNESS: I'm really trying to say the following that is, that first of all that, of the school resources which are provided by the school system, those which show most relation to a child's achievement are the characteristics of the teachers, in particular the verbal skills of the teachers. But that these are not as important for the

> achievement of the particular student in terms of our analysis as the social composition of the rest of the student body. Secondly, that with regard to compensatory programs, if one evaluates these programs simply in terms of the increase in performance that occurs as a consequence of them or that occurs for children who have participated in them, there is very little cause for optimism with regard to the overall effectiveness of these programs. But, of the things which the school board provides, the characteristics of teachers and in particular the verbal skills of teachers seem to be the most important characteristics.
>
> THE COURT: We will take a short recess.[50]

Coleman seems to be saying that the cause of unequal educational opportunity is an input--the socioeconomic status of the students. This was not a factor mentioned in his March 21st opinion as one of the contributors to low educational quality. Doyle is right to be concerned about the relationship between Dr. Coleman's findings and the basis for the March 21st ruling. Counsel for defendants did not miss this point:

> Q: That's exactly what I'm leading to. And, regardless of the race, if it's a low socioeconomic homogeneous neighborhood, you find low achievement?
>
> A: Yes.
>
> THE COURT: Well, that's a problem for the legislators tors or the school board; not for the Court. In other words, there is no--according to you, there is no discrimination based upon race or color or national origin. The discrimination, if any, is based upon poverty. And that may not be anything a court can do. I mean, there is no constitutional deprivation.
>
> THE WITNESS: Two things have to be distinguished. One is the deprivation which arises to a child from his own background and the other is the deprivation which may accrue to him as a consequence of the backgrounds of the other [69] students in the same school that he is attending, and the research that I was reporting found both of those factors to be important in a child's achievement; the first being more important, but the second not being negligible.

> THE COURT: Well, if you have a school that is 100-percent white but is economically and culturally deprived, why, its level would be just as low as one that is 100-percent black.
>
> THE WITNESS: The results of the research would say that a child in that school would be suffering lack of equality of educational opportunity as a consequence of the other students in the school, independent of the fact that it was white rather than black.
>
> THE COURT: I thought that's what you said.[51]

During the testimony of Dr. Bardwell later on in the same day, the real purpose of including Dr. Coleman's testimony became evident. Dr. Bardwell was asked to comment on a map which showed mean family income in the school attendance zones of the schools plaintiffs wanted relief for (including the 10 additional schools that did not meet Doyle's proposed standard of 75% Hispano or black enrollment but which would meet plaintiffs' proposed standard of 75% combined minority enrollment).

> THE COURT: Who prepared this plan that you are offering? Or are you just trying to refute what was in my opinion? Of offer some rebuttal or something of that sort?
>
> You make an offer of proof. I mean, just for the record.
>
> MR. GREINER: I'll be happy to, Your Honor.
>
> THE COURT: We will not have any of this. There's no point in retrying the case. I'm not going to do it. We spent all those weeks, you know, trying the lawsuit. And you had full opportunity and, too, I don't want any more testimony based upon the testimony received this morning, you know, that would supplement the main case. You follow me, don't you? I mean, that would support the position taken by Dr. Coleman [144] or by Dr. Sullivan. Because, really, it goes to the basic issues that we tried, this material.
>
> MR. GREINER: Well, perhaps I misread Your Honor's opinion of March.

THE COURT: I didn't think we were going to go over all that material again, you know. We developed a tremendous record of factual material that you can refer to if you like. But I didn't--the purpose of the hearing now is for the most part to receive any suggested remedies that you wish to offer, you know, so that we can enter a final judgment in this case. It won't be too final, I don't think. I think it's going to be temporary final. But, I mean, it doesn't look to me like we're going to wrap up this in one fell swoop. We do the best we can.

MR. GREINER: Your Honor, the major thrust of the plaintiffs' evidence at this hearing is going to be directed toward remedies. But, as we said on April 16th in our first preliminary memorandum, we did feel that in the Court's opinion of March 21 that the Court had indicated that it had tentatively selected a criteria of racial composition and the Court at least in my mind indicated that it had not closed its mind to this question.

THE COURT: Well, I just don't feel that we should reopen the whole case. Do you follow me? Do you know what I'm talking about?

[145] MR. GREINER: We are not reopening the whole case. We're only talking about these ten additional schools, Your Honor.

THE COURT: Well, I say to you that--you make your offer of proof and maybe we can get some enlightenment from that as to what you have in mind.

MR. GREINER: What we have in mind is, Your Honor,--in our offer, is as follows: that the evidence which is already in the record in this case regarding the achievement in these target schools, regarding the racial composition of these target schools, regarding the teacher experience of these target schools, all shows that the educational situation in these ten additional target schools is exactly as bad as--

THE COURT: Oh, I agree with that, but the record shows that. If you will remember in my finding I said that we were limited under the pleadings and the issues developed to attack racial segregation. Isn't that right?

MR. GREINER: That's right.

THE COURT: In other words, what Dr. Coleman said today, namely, that desegregation of poor people and deprived people creates this problem. Well, this is a problem that I cannot deal with. It's not a Fourteenth Amendment problem, you know. I don't think I can. If it doesn't deal with discrimination based upon race or national origin or creed. But, if it is discrimination based upon poverty, this is not [146] open to me. I mean, in and of itself. That's what Coleman said.

MR. GREINER: I believe what Dr. Coleman said, Your Honor, is that--

THE COURT: Am I wrong about that?

MR. RIS: No, Counsel, in his proposed--

MR. GREINER: I'd like to be able to finish my offer of proof.

THE COURT: That's what I thought he said.

MR. RIS: That's what he said. He is merely arguing now; not even suggesting additional proof. It's not even an offer of proof.

THE COURT: Well, we will see what he's got.

MR. GREINER: What Coleman said this morning, Your Honor, was that the factor in school which contributed most to the inequality of educational opportunity was the homogeneous peer group. We asked Dr. Coleman if there is any difference in the kind of peer group environment created by Negroes as compared with Hispanos. He said no. If there is a racial basis for saying that a school that is 75 percent of one ethnic minority is a segregated school, that same basis obtains if it's 35 percent of one minority group and 40 of another. We can see very clearly that the effects are exactly the same. Those children got in those schools--

THE COURT: All right. That is all argument based [147] upon the evidence that is in the record now, I suppose. I mean, you introduced evidence at length and in depth concerning the conditions in these schools, all of them.

MR. GREINER: That's correct. We haven't correlated the socioeconomic data which is already in the record and that was the purport of my last question to Dr. Bardwell.

In words, there is a very strong correlation in this city between socioeconomic status and race and ethnicity. You can talk about the upper-mddle-class black school but when we look at the schools that are the subject of this presentation, there are no such schools. They don't exist.

THE COURT: Well, I suppose that you might classify the Northeast Denver schools along this line, some of them.

MR. GREINER: Well, but we look at the achievement level of those schools--we see then that there is no good achievement in those schools.

THE COURT: Well, then, Dr. Coleman's testimony doesn't come out. That's the only thing I can say.

MR. GREINER: Perhaps it doesn't on that one point.

THE COURT: What do you propose to have Dr. Bardwell testify to?

MR. GREINER: Well, we will get to the 1960 census data in the record. Dr. Bardwell has also conducted a study, I believe in 1967, dealing with the socioeconomic conditions of this north central portion of the school district and in [148] this portion many of these target schools to which we're having reference. We do have some updated socioeconomic data. That was all I was seeking to put through this--

THE COURT: Do you have an exhibit on that that he has prepared?

MR. GREINER: We're going to make one. Your Honor, right here by just labeling the schools for which we have this additional data.

THE COURT: What is the story? What's he going to say?

MR. GREINER: That the socioeconomic status of this neighborhood is still very, very low in terms of the rest of Denver. These are still low socioeconomic schools, just as they were in 1960.

THE COURT: That the condition is the same as that which he has read from Exhibit 883?

MR. GREINER: That's correct.

THE COURT: Substantially?

MR. GREINER: Relatively, yes.

THE COURT: It hasn't changed on any of these schools that you have just mentioned?

THE WITNESS: Schools we're talking about here and the area that comprises a good portion of the target schools that we have in mind, that is in the area that is precisely in the middle of the so-called census poverty area [149] of the city in which I was consultant to the mayor's office on the survey of that particular area to determine certain socioeconomic characteristics, educational characteristics of these residences. This is the so-called poverty area of the city. And it is in that area--The results of the study are published on poverty and jobs in Denver through the mayor's office and I just simply wanted to point to the fact that half of the target schools that we're talking about here are located precisely in the middle of this poverty area.

THE COURT: Okay.

MR. GREINER: May we proceed with that, Your Honor?

THE COURT: Well, doesn't that pretty well wrap it up? What you're saying is that there is no substantial change relatively.

THE WITNESS: What I'm saying, Your Honor, is that it is peculiar in a way that, if one were to look--if one were to lay the red dots on the northern area of the city here, which is called the poverty pocket of the city, that one would find five of the target schools in that area and that the schools that we have designated here as Court schools, while lying also in that poverty area, that these lie in the middle of the worst of it.

THE COURT: What do you want him to do? Mark up the map now?

MR. GREINER: Yes, just to indicate these other [150] target schools and their locations.

THE COURT: All right. One more map isn't going to kill us.

MR. RIS: I'm not sure, Your Honor.[52]

The wording of the opinion on the proper standard for defining segregation does appear very tentative (see page 45) and it is understandable that Mr. Greiner should assume it was still open for discussion. In a footnote of the May 21st opinion on remedies the Court says: "We concluded in our March 21st opinion that it was not appropriate to place Negroes and Hispanos in one category to arrive at a minority population of over 70%". (313 F. Supp. 90 at 92) It is not clear how the seemingly tentative opinion of March 21st solidified into the firm conclusion of May 21st, but remarks made at the very opening of the hearings on relief offer some suggestion:

> THE COURT: Now, you undertake to represent the Hispano community too?
>
> MR. GREINER: That's correct, Your Honor.
>
> THE COURT: And are you certain that they wish to be bused, integrated? Every word I get, every piece of evidence I get is that there is a difference of viewpoint here, a very major difference. That they would resist any effort to integrate.
>
> MR. GREINER: Your Honor, the only answer that I can give the Court based on the record in this case is that we had no intervention in this case after notice of publication and quite a bit of publicity. We had no intervention from--in behalf of the Hispano community that would indicate that divergent view. I think one of the questions--
>
> THE COURT: Well, I think we ought to keep this in mind in presenting the evidence, this inquiry in mind, and consider whether it's proper for a Court and counsel to determine what's good for them and order them to do it whether it is of their consent or not, you know. I don't see that that is saving their constitutional rights, if this be true.

> MR. GREINER: Well, I think, Your Honor, it's going [9] to be what it--what it boils down to is a question of, is there another reasonable, realistic alternative? That's what this hearing is all about. And the question of the consent of the people who are to be affected by the plan of relief is really a secondary question. The question is, how do you remedy the inequality? A lot of children in the school district wouldn't go to school at all--
>
> THE COURT: I'm not talking about the children. I'm talking about the people, you know. No, I'm merely saying that our basic legal problem is remedying the invasion of the constitutional rights. And, if it's true that there is a segment that says their rights are not violated, why, I don't see that it is any of our business to say, "Well, they are. And you're going to get them remedied whether you like it or not." I just don't--Not a single Spanish-origin person has appeared here demanding relief or even suggesting that any should be granted to them.
>
> MR. GREINER: Well, I think the only basis upon which we can proceed, Your Honor, is the status of the record and the record--in the record there is no dissenting Hispano intervenors.
>
> THE COURT: Okay.[53]

Again, we see the element of caution in Doyle's decisions. He is obviously concerned about what the law requires and continues to adhere strongly to the premise that to do more than protect the basic Constitutional rights of the aggrieved means inevitably to impinge unconsciously on the rights of others. At this particular juncture he is confronted not only with the usual task of interpreting what the legitimate rights of the aggrieved are, but also with deciding who they really are.

The question as to what "works" to improve educational quality is something about which very little of a definitive nature is known. The judge took a very active part in the hearings on relief--much more so than on the trial on the merits. He vigorously cross-examined witnesses not so much to point out inconsistencies in their testimony or otherwise "put them on the spot," but to clarify the research findings being presented in an attempt to understand the nuts and bolts implications of the various plans for remedy being advanced. An excerpt from a dialogue with witness Dr. Bardwell:

> THE COURT: Well, the plan wouldn't give you complete integration, anyway, would it?
>
> THE WITNESS: It would certainly give you complete integration for the 29 schools that are involved, yes, sir. And in fact, the most efficient way that it could be done.
>
> THE COURT: Let me see if I understand it. Doesn't [251] this contemplate moving, say kindergarten through the third grade to an Anglo school and vice versa? Or moving the fourth, fifth and sixth grades of the receiving school to the sending school?
>
> THE WITNESS: That would be Plan 2. And that would of course, involve more students.
>
> THE COURT: Then once they arrive where they would be, why, this would complete integration within each classroom, is that correct?
>
> THE WITNESS: That's right.
>
> THE COURT: I mean, that's what you have contemplated?
>
> THE WITNESS: That's correct.
>
> THE COURT: Turning to the high school proposition that you have submitted, I assume that from what you say that your alternative plan for making Manual a specialized school is not one you think is as good as the desegregation plan?
>
> THE WITNESS: No, it would not.[54]

Two days later Doyle was questioning Dr. Robert O'Reilly, Assistant Director of Research and Evaluation, New York State Department of Education.

Dr. O'Reilly had been called upon by plaintiffs to testify on the efficacy of compensatory education programs. Counsel was apparently trying to establish that compensatory education is of very limited value in improving educational achievement, especially in a segregated setting. This assertion seemed to surprise the judge. He found it difficult to believe that it could benefit minority youngsters to be thrust suddenly into an integrated academic environment without some kind of continuing educational support that would allow them to participate more effectively with their new, more privileged peers:

> THE WITNESS: My opinion is, after reviewing the studies and their results that there are no general practical effects accruing to students' educational development as a function of compensatory education programs which typically include these kinds of components.
>
> THE COURT: Are you saying that the system based upon these components is valueless?
>
> THE WITNESS: Yes.
>
> THE COURT: And the individual elements in it--in its totality has no value whatsoever?
>
> THE WITNESS: I don't think so. They constitute basically giving the minority, the disadvantaged--
>
> THE COURT: Don't even the psychologists help at [619] the local level?
>
> THE WITNESS: No, not typically.
>
> THE COURT: Amazing.
>
> THE WITNESS: I was going to say--you see, these things have already been done by the schools. They have been done for years. And what this really constitutes is giving the minority child more of what the schools already have. It's nothing particularly new about any of these things.

THE COURT: But none of it has any value?

THE WITNESS: No, sir. Not only do I have this opinion but--

THE COURT: Are you saying it's not any value in combination with integration?

THE WITNESS: There is no indication that these particular kinds of approaches would necessarily work in an integrated setting. The evidence is just not generally available on that area on that question.

THE COURT: And it's valueless at every level?

THE WITNESS: Equally valueless from a practical point of view, yes.

THE COURT: The lack of value is the same at every level?

THE WITNESS: Basically, it has turned out that way. And perhaps I should define what I mean by practical value. We mean that--rather, I mean that the studies result in [620] differences as a function of compensatory education programs which would indicate that they have some potential in improving the--some real potential in improving educational development among minority students relative to those who don't get this kind of compensatory education. The gap between blacks and whites or Puerto Ricans and whites is just hardly affected or is not affected at all.[55]

Doyle expressed his inability to accept this testimony very directly:

THE COURT: Well, then, you're not recommending any [623] doctrinaire approach to this problem at all?

THE WITNESS: No, sir. The work that has been done in the field doesn't allow it.

THE COURT: But you are convinced that there is no validity to anything that has been tried so far?

THE WITNESS: Basically, what the schools have tried--

THE COURT: I just can't understand how you can be so sure that it can't be refined or developed.

THE WITNESS: May I explain a little further? The studies in compensatory education can be divided into two groups. One group of studies in development of compensatory education have been those approaches that have been developed basically by school personnel. To some extent they may have been helped by consultants, But, as I mentioned before, what these studies boil down to generally is to give the kids, the minority kids, what the school already has; what it already knows how to do. This is not based on a detailed study of the psychological--

THE COURT: I don't agree with you at all.

THE WITNESS: Pardon?

THE COURT: I don't agree with you at all. I would say a person-to-person approach to a child does proceed on a psychological thesis; that the kid has no promise, home. He has no figure to look to and he has got to find some substitutes. Where is he going to find them if he's in a completely impersonal [624] atmosphere of the survival of the fittest?

THE WITNESS: Some of them will. There is no doubt about it.

THE COURT: What happens to others who are strangers, who are in an atmosphere in which they are inferior and they feel inferior? Where are they going to find some kind of consolation? Have you been through this? I have.

THE WITNESS: I grew up in that situation.

THE COURT: Now, what does he do? He may fight his way through. It will take a few years. But he may not. The probabilities are that he will drop out and get a job, or worse. You don't think this is true?

THE WITNESS: Well, sir--

THE COURT: I mean, psychologically, the school is taking over for the family in many instances. It has to. I know this is abhorrent to all of you. You just disregard it all as paternalism. But you can't. I mean, this is the fact of life. The church has fallen down somewhat. The family has collapsed, and there is not much left. And a kid has to relate to something, to an institution, and to people doesn't he? Where is this substitute? So, you say there is no psychological foundation for this? There is no foundation in experience? That you can just substitute this competitive atmosphere? And this impersonal competitive atmosphere of the integrated school and let him sink or swim?

[625] THE WITNESS: I think the idea of competition in the integrated school has been overemphasized. That element is there. What I think may be emphasized more than anything else is the fact that the integrated school by itself represents an acceptance of other cultural groups because they are mixed together, because they are living together, working together towards essentially the same goals. When students are separated in different schools, as they are in Denver Public Schools--

THE COURT: Well, that's a different matter. We're not talking about this.

THE WITNESS: Well, I thought you were--

THE COURT: Well, I'm talking about-- We're not debating whether it's valuable to have them in an atmosphere that is integrated. What I'm questioning is your statement that the integrated setting can be just a substitute for everything else that we have ever learned.

THE WITNESS: I wouldn't say that, sir.

THE COURT: Well, that is what's implied here. That this is a cure-all.

THE WITNESS: It can help.

THE COURT: It can help?

THE WITNESS: Yes.

THE COURT: That's all you're saying?

THE WITNESS: That's all.

[626] MR. GREINER: May I proceed, Your Honor?[56]

Here the Court takes it upon itself to function as a social science and education authority and second-guess the expert testimony being offered. The judge's role as "expert" is accented strongly by the complete absence of any evidence from witnesses for the defense. That the innovative programs they had instituted to date and which they proposed to incorporate into their remedy for unequal educational opportunity had *any* effect on academic achievement. Doyle was not selecting from the conflicting findings of two witnesses. Nor was he advancing his own opinion to fill an informative vacuum. Instead, he flew directly in the face of the unequivocally-stated opinion of a highly qualified witness.

Doyle's opinion on the subject had a lot to do with the shape of the remedy he adopted. Plans of both plaintiffs and defendants were judged to be unsatisfactory.

Plaintiffs, with the assistance of Dr. O'Reilly actually formulated four different plans. One of them suggested the cross-transfer of students; another, the transfer of a complete section (several grades) of a schools student body between the 12 minority elementary schools and 17 to 19 Anglo schools. The other two plans called for similar transfers involving 22 minority elementary schools and 28 to 31 predominantly Anglo elementary schools. (These incidently now numbered 17. Two elementary schools--Smedley and Elleria had been overlooked at the trial on the merits but were subsequently found to conform to the standard of 70% black or Hispano enrollment.) The other plans applied the same basic strategies for the desegregation of the 10 additional schools which would be included under the broader standard advocated by plaintiffs.

The second component of the plaintiffs' proposals pertained to junior and senior high schools. One suggestion called for busing the 1,038 students attending Thomas Jefferson Junior High and John F. Kennedy Senior High to Cole. Black students already being bused to Cole from the Garden Place Housing Project would be transferred to Thomas Jefferson and Kennedy. The Anglo students who would be bused under this plan were already being bused from sections of the city that had overcrowded schools or where junior high schools had not yet been built. The second suggestion of the plaintiffs for desegregation of junior and senior high schools would have added three junior highs to the list of schools plaintiffs contended should be considered minority schools.

Another pair of suggestions were formulated specifically for New Manual High School located in the old part of Denver in a neighborhood traditionally black but now containing a substantial Hispano population as well. The first suggestion would have moved Manual's attendance boundaries southward to create a desegregated attendance zone. As a result of this change some black and Hispano students would be redistributed to North and East High Schools; Anglo students formerly attending South and East High Schools would then be within Manual's new boundaries. The other option with respect to Manual was to turn it into a "magnet" school offering special educational programs designed to attract students from all over the city. Transportation was to be provided by the school district.

The plaintiffs' final proposals called for compensatory education of minority students, in-service training of teachers, special orientations for staff and faculty and the employment of teacher aides.[57]

The school board's proposed "Quality Education Plan" formulated by Superintendent Gilberts, included several features for improving educational quality: upgraded in-service training for teachers; establishment of three major elementary school complexes involving some of the 17 Court-designated minority schools. (The complexes would be based on the original suggestions incorporated by Gilberts in his October, 1968 proposal for "Planning Quality Education"); expansion of early childhood education (Headstart and Follow Through) for students from disadvantaged neighborhoods; implementation at Fairview Elementary School and Baker and Cole Junior High Schools of special programs funded through the Educational Achievement Act of Colorado (Senate Bill 174); development of innovative instructional programs involving cultural arts, student and teacher exchanges and summer, after-school and vocational-technical education programs; increased counseling efforts; hiring of teacher aides and recruitment of volunteers to assist with teaching and clerical duties at minority schools; higher salaries for an extended work year, reduction of class size and better equipment and instructional materials were proposed to eliminate the high rates of teacher turnover at the minority schools.

A final component of the school board's plan called for a broadening of their voluntary open enrollment plan such that transportation and space at the receiving school would be provided at school district expense for any voluntary transfers that would improve racial balance.[58]

The Court concluded that none of the plans are wholly suitable and that a carefully tailored plan consisting of parts of the submitted ideas should be adopted. In his opinion of March 21st Doyle had indicated his reluctance to impose mandatory transportation as part of a remedy (313 F. Supp. ____at 84). His main objection to the plaintiffs' proposals was that they laid too much emphasis on transportation. If one of the more modest of the plaintiffs' plans were adopted (involving only the Court-designated schools) over 11,000 elementary school children alone would be bused on an average one-way distance of 613 miles. If the broader suggestions were adopted the number of elementary school transferees would double and busing distances would increase by some indeterminant but large amount.[59] Plaintiffs did not formulate the kind of detailed compensatory education programs outlined by defendants. They relied more on the imputed educational benefits of desegregation per se. Doyle did not dispute the importance of integration in raising academic achievement but called for more time to bring it about. He also declined to specify the methods to be used, giving the school board an opportunity to minimize the need for compulsory busing.

As the opinions expressed in the transcript predict, Doyle placed heavy stress on compensatory education in his remedy.

> Desegregation in and of itself cannot achieve the objective of improving the quality of the education in schools. It must be carried out in an atmosphere of comprehensive education and preparation of teachers, pupils, parents and the community. It also must be coupled with an intense and massive compensatory education program for the students if it is to be successful. (313 F. Supp. 90 at 97)

In the final decree and judgment of June 11, 1970, the Court ordered that 10 nondesegregative strategies be implemented to increase educational opportunity. All except the last--Spanish language instruction--

had been included in the defendants' plan. The Court also adopted the school board's voluntary open enrollment plan as an interim desegregation measure for one year. As of September, 1971, 7 of the 14 Court-designated schools were to be desegregated such that the Anglo student population exceeded 50%. The remaining seven schools were ordered desegregated as of September, 1972. Baker Junior High School was to be completely desegregated by September, 1972 as well. At the option of the school board Cole could be desegregated along the lines established for Baker. Alternatively, the board could maintain it as an open school with special programs to be ready for the Fall of 1971. Manual High School was to be an open school "...for the continuation and expansion of the vocational and pre-professional training programs which have been instituted by the Principal, the faculty and staff. If this program develops and transforms Manual to an outstanding institution capable of attracting and accommodating students from the entire City, an integration program would be superfluous." (313 F. Supp 90 at 99).

The final provisions of the June 11 decree called for an intensive program of education within the community, teaching staff and administration orienting teachers in the field of minority cultures, and how effectively to deal with minority children in an integrated environment and educating the community as to the educational benefits and values to be derived from desegregation and integration.

Doyle felt that the school district administration was best equipped to devise the system of redistricting and transportation necessary to meet the requirements of the order. As a consequence, the order did not detail any methods for implementation. Mandatory transportation was to be avoided "to the extent possible." The Court retained jurisdiction to review the final details and supervise implementation.

IV. The Supreme Court Decision and Preceeding Litigation

Both parties immediately appealed the final decree and judgment to the 10th Circuit Court of Appeal. Defendant's Notice of Appeal was filed on June 16, 1970, and plaintiff's Notice of Cross Appeal was filed on the 24th. The school board also filed a motion for stay of order pending appeal which was denied on July 28th, 1970. Simultaneous briefs were filed on August 11, reply brief on August 17. The matter was fully argued the next day.

Defendants appellants contested the conclusions and findings of the District Court that: 1) de jure segregation existed in northeaast Denver; 2) that rescinding Resolutions 1520, 1524 and 1531 was in itself an act of de jure segregation; secondly, they denied that equal educational opportunity was being withheld in the Court-designated core city schools earmarked for relief under the District Court's final decree of June 11.

Plaintiffs cross-appellants appealed four aspects of the final judgment:

> 1. The Court's failure to grant relief to those schools whose combined Negro and Hispano enrollment was in excess of 70%;
>
> 2. The Court's failure to find that the attendance area boundaries of certain schools were intentionally gerrymandered to isolate and confine Negro and Hispano children and that such acts constitute _de jure_ segregation;
>
> 3. The Court's failure to find that the neighborhood school system is unconstitutional where it in fact produces segregated schools, regardless of the intent of the Board;
>
> 4. The Court's failure to require that all desegregation and integration be accomplished by September, 1971.[60]

The Circuit Court took the appeals under advisement, indicating it wouldn't rule on the case until the Supreme Court ruled on the Charlotte-Mecklenberg cases.[61]

In January there were hearings before the District Court regarding plans being formulated for the portion of the order to be implemented by September 1971.

On February 27 the deadline for applying for $647,000 in school desegregation aid under ESAA was allowed to expire. The "antibusing" school board majority carried a resolution in December to postpone the filing for funds until after the 10th Circuit Court ruled on the appeals and cross-appeals. A group of Denver residents as well as the board minority attempted unsuccessfully to get the board to reconsider its decision and apply for an extension of the deadline. The majority gave a number of reasons for not seeking the federal aid. Primary among them was the conviction that the assistance program would require action beyond anything ordered by the District Court and that the implementation of another program would simply add to the disruption and confusion already resulting from the court orders.[62]

The school board filed a motion for stay of all judgments which was granted on March 2, 1971. Meanwhile, Superintendent Howard Johnson (who replaced Gilberts in August 1970 and was generally regarded as a "yes man" for the racist school board by the minority community)[63] and his staff continued to develop plans for complying with the District Court order. Six alternative plans involving up to 39,000 elementary pupils and 41 schools were detailed at a meeting on March 17. In addition, plans for the desegregation of Baker Junion High School and the creation of a Cole-Manual magnet school complex were outlined.[64]

The school board next filed a motion for stay of all preparations for implementation of the plans ordered by the District Court in its final decree. The board cited the long delays in the Appeal Court ruling on the appeals and cross-appeals. The Circuit Court acquiesced and granted the stay on March 26. On the 28th, attorneys for the plaintiffs filed a motion with the Supreme Court to vacate the stay. On April 26 the Supreme Court did so after announcing its ruling on the combined Swann vs. Charlotte-Mecklenberg cases. The next day, April 27, the school board voted by its usual 4-3 margin to file yet another motion for stay. But the motion was apparently not filed.[65]

Predictably, the school board selected "Plan B" from the six options developed by the administration to present to Doyle's court. "B" would have involved the smallest number of children and elementary schools of the six plans. The plaintiffs meanwhile were preparing their own plans which were essentially revisions of the school board suggestions. Representatives of the plaintiffs met with the board's integration steering committee in an attempt to agree on a joint plan to present to the Court. No agreement was worked out, however,[66] and the plaintiffs argued for adoption of a revised version of "Plan C" -- the most stringent of the board's plans -- at the May 14 District Court hearings.

Judge Doyle selected many of the features of the plaintiffs' recommendations. As their version of Plan C suggested, Asbury Elementary School was included in order to eliminate the need to put several of the other schools involved on a double session. The faculty of Cole had voted not to have Cole turned into a magnet school but to have it desegregated instead. Plaintiffs concurred with this proposal arguing that it wouldn't be able to attract students from throughout Denver. Doyle felt that, having given the board the option of making Cole a magnet school in his 1970 order, he could not now withdraw it. He therefore approved the board's plan for the Cole-Manual magnet school complex. The "weakness" of the plan according to Doyle, was that: "It doesn't call for the transfer of a substantial number of pupils from the predominantly Anglo elementary schools into the minority schools. However, it's my judgment that the school board should have some discretion in determining how the integration is to be accomplished."[67] As a result of the approved mandatory transfers, Anglo enrollments in the elementary schools to be desegregated by September, 1971, would be between 51% and 58%. Kindergarten pupils were not involved in the plan.[68]

On June 11th the Appeal Court issued its opinion and judgment regarding the appeals and cross-appeals. With respect to the first portion of the appellants' first argument -- that there had been no de jure segregation of the Park Hill Schools, the Appeal Court upheld the lower court ruling unequivocally:

> [13] When a community experiences a steady and ascertainable expansion of Negro population resulting in a new and larger "Negro community", the school board must exercise extreme caution and diligence to prevent racial isolation in those schools. When new buildings are built, new classrooms added, attendance areas drawn, and teachers assigned, the board must guard against any acts which reflect anything less than absolutely neutral criteria for making the decisions. The facts as outlined above simply do not mirror the kind of impartiality imposed upon a board which adheres to a neighborhood school plan. Cf. Downs v. Board of Education of Kansas City, supra.

> In sum, there is ample evidence in the record to sustain the trial court's findings that race was made the basis for school districting with the purpose and effect of producing substantially segregated schools in the Park Hill area. (445 F.2d 990 at 1002)

As to the second portion, whether the recision of the three famous resolutions was in itself an act of de jure segregation, the Appeal Court merely concluded that the District Court was within the bounds of its discretionary power to order readoption of the resolutions once it had ascertained the existence of a Constitutional violation. The Court then addressed the question of unequal educational opportunity in the core city schools. It held that the single input factor -- teacher experience -- was insufficient to support a finding that inferior education was being offered. It also rejected the output criteria cited by the lower court -- test scores and dropout rates -- arguing that even a completely integrated setting wouldn't alone resolve those problems. (445 F.2d 990 at 1004) (This, incidentally, strikes me as a misrepresentation of the District Court's real contention which was that an integrated environment could prevent those problems from arising in the first place.) The Appeal Court also addressed the theory that segregation per se, regardless of cause, results in unequal educational opportunity.

> It was recognized that the law in this Circuit is that a neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools, provided the plan is not used as a veil to further perpetuate racial discrimination. 313 F.Supp. at 71. In the course of explicating this rule and holding that the core area school policy was constitutionally maintained, the trial court rejected the notion that a neighborhood school system is unconstitutional if it produces segregation in fact. However, then, in the final analysis, the finding that an unequal educational

> opportunity exists in the designated core schools must rest squarely on the premise that Denver's neighborhood school policy is violative of the Fourteenth Amendment because it permits segregation in fact. This undermines our holdings in the Tulsa, Downs and Dowell cases and cannot be accepted under the existing law of this Circuit. (445 F.2d 990 at 1004)

In this respect it overturned the lower court ruling. In all other regards the District Court ruling was upheld.

The Circuit Court made much of the passage of Resolution 1562 by the newly-elected school board (445 F.2d 990 at 1005). This resolution called for the superintendent and his staff to devise a plan for the raising of educational quality in the Court-designated schools regardless of the outcome of the litigation. The importance attributed to this resolu- by the Court is difficult to understand since it was passed by a unanimously antibusing board. The terms of Vorhees, Amesse, and Noel had expired and the three new members who replaced them had run on an emphatically antibusing platform.

Late in June the plaintiffs filed a supplemental plan for Hallett and Stedman Elementary Schools in Northeast Denver. They argued that although Hallett and Stedman were among the schools found to be de jure segregated there had been no plans to integrate them under the three rescinded resolutions. The relief ordered by Doyle, therefore did not extend to them.[69] The District Court disclaimed jurisdiction regarding the Hallett-Stedman request. Plaintiffs then filed a motion for clarification of jurisdiction with the 10th Circuit Court.[70] In August the motion was granted and the appeal court remanded the Hallett-Stedman issue to the lower court, also confirming in its opinion that the two schools were, in fact, illegally segregated. There were hearings on plans early in September. On the 8th, Doyle ordered that the schools be integrated by November 1st.[71] Although Doyle had been appointed to the 10th Circuit Court of Appeal during the Summer of 1971 he continued to hear all U.S. District Court actions in the lawsuit. He did not participate in Appellate Court rulings in the case.[72]

The school board had contended that desegregating the schools mid-semester would be disruptive. When Doyle set the November deadline they planned an appeal to the 10th Circuit Court. In one of the only instances of negotiated compromise between the litigants in the many years of proceedings, attorneys from both sides reached an understanding whereby defendants agreed not to file their appeal and to incorporate some minor revisions of the Court's plan at the behest of the plaintiffs. In return, plaintiffs agreed to extend their deadline until January 30 so that the plan could be implemented during the semester break. Doyle sanctioned this new arrangement.[73]

According to principles on both sides of the dispute, Doyle would have welcomed more such negotiated settlements had they been in the offing.[74] As it was, however, the issue never came up. The dispute was generally very emotional and was characterized by one of the attorneys as "all-out warfare".[75] In addition to the resentment felt on both sides, recalcitrance was reinforced by the school board's antibusing mandate. To compromise, or to be perceived to compromise, with the "probusers" could have adverse political consequences. Negotiation on the Hallett-Stedman question was possible because there were no substantive issues involved. In canceling the appeal, needless work for both sides was avoided.[76]

Shortly afterwards plaintiffs petitioned for a writ of certiorari before the U.S. Supreme Court and defendants responded by filing a cross petition. Plaintiffs' petition for certiorari was granted in April, 1972. In May they filed their briefs and the case was argued on October 12, 1972.[77] The Legal Defense Fund of the NAACP played an important role in the Supreme Court litigation. James Nabrit III of the Legal Defense Fund (LDF) lent his services to Gordon Greiner in writing the writ of certiorari. He and Mr. Greiner also argued the case before the Court. Mr. Ris, the special trial attorney who had been hired by the defendants before the trial on the merits and who had continued to serve as defendants' main courtroom counsel, argued for the school board.[78]

The Supreme Court decision delivered by Justice Brennan was handed down on June 21, 1973. That date marked a major victory for the plaintiffs. First, the Court ruled that blacks and Hispanos suffer such similar kinds of discriminatory treatment that it was an error not to use a standard of combined black and Hispano enrollments in defining "segregated schools". This ruling alone significantly increased the permissible scope of the remedy. Next, the Supreme Court determined that plaintiffs had been laboring under too heavy a burden of proof in having to demonstrate segregative activity at each school separately in order to justify relief for that school. Once it had been shown that the School Board had illegally segregated a substantial portion of the school system (Park Hill) "... it is only common sense to conclude that there exists a predicate for the existence of a dual school system (37 L. Ed. 2d 548 at 559). Brennan went on to clarify the exact nature of the burden of proof that had now been shifted to defendants' shoulders. The school board must be able to "... to support a finding that segregative intent was not among the factors that motivated school board action (37 L.Ed. 2d at 564).

The case was remanded to the District Court with an outline of the duties the lower court was to perform:

1. "Afford respondent school board the opportunity to prove its contention that the Park Hills area is a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district." (L.Ed. 2d at 566).

2. If the school board was unable to prove this contention, the district court was to determine whether the segregative acts carried out in the Park Hill schools constituted the entire school system dual in which case the school board would have an "...affirmative duty to desegregate the entire system 'root and branch'". (37 L.Ed. at 566)

3. If the school board succeeded in proving that the Denver School System was not dual, it was to be given the opportunity to rebut plaintiffs' prima facie case of de jure segregation in the core-city schools.

In July defendants filed a motion for clarification and rehearing by the Supreme Court which was denied.[79]

Doyle conferred with the litigants in August to decide on the issues to be heard and the scope of the argument. A pretrial conference was held in October and hearings on the issues were held for three days beginning on December 4th.[80] The question before the Court was the first set forth by the Supreme Court--whether the acts of de jure segregation found in the Park Hill schools constituted the Denver School District a dual system, or whether Park Hill could be shown, by reason of geographical structure or natural boundaries, to be a separate part of the system.

On December 11 the District Court issued its memorandum and opinion. It noted that defendants conceded the point that Park Hill was not a geographically isolated portion of the district. It then concurred with evidence proffered by plaintiffs that Park Hill was not different from areas adjacent to it in terms of social or spatial characteristics or provision of municipal services. Finally, it affirmed that there must of necessity be a relationship between racial concentration on one part of Denver and racial concentrations in other parts: "The essential interplay between intentional segregation in one area and the condition in other areas was noted. It was recognized that the concentration of minority groups in one area will of necessity promote or maintain Anglo concentrations in others." (368 F.Supp. 207 at 210) It thus concluded that, given the Supreme Court's recent ruling, the Denver School District was a dual system.

V. Remedy Framing Subsequent to the Supreme Court Decision

On December 17, the Court issued a memorandum to both parties requesting the submission of plans for the desegregation of the entire school system. These plans were to be submitted by January 21, 1974, subsequently extended to January 25.

On January 22 the Denver Board of Education adopted a school desegregation plan drawn up by Superintendent Kishkunas and his seven-person task force. The inch thick document--"A Plan for Expanding Educational Opportunity in the Denver Public Schools"--devoted far more space to presenting strategies for improving educational quality than to desegregate per se. The plan's main features were:

1. The closing of eleven elementary schools and one junior high and the reassignment of their pupils to other schools. Most of these eleven schools were of predominantly minority student bodies. These closings would have resulted in the busing of 4165 students.

2. Creation of four elementary and one junior high enrichment center. At these centers pupils from pairs or clusters of Anglo and minority schools would receive a taste of integration and of special educational programs for half-day sessions for three weeks per semester.

3. Creation of an "open" elementary school. Its less structured educational setting was expected to attract an integrated student body from all over Denver.

4. Teacher assignments to insure a desegregated faculty of at least 5% black and 2% Hispano at each school.

5. Increased encouragement for more students to use the voluntary open enrollment (VOE) transfer program.

6. Phasing out of 36 mobile classrooms located at various schools. Resultant boundary changes at a few schools could slightly improve their racial compositions.

7. A junior high which would serve as an "enrichment center" on possibly the same basis as the elementary school enrichment centers.

No plans at all were made to desegregate at the junior and senior high school levels. The percentage guidelines adopted by the board in determining desegregation were an Anglo enrollment of between 25% and 75%. By this standard 53 schools were deemed already integrated. But the school board plan did not even propose to apply this rather lenient standard to 13 predominantly minority schools (less than 25% Anglo enrollment).[81]

The next day, January 23rd, plaintiffs filed their plan calling for pairing and clustering of elementary schools. Student reassignments under the previous court order (June 11, 1970) would be discontinued in favor of a single, comprehensive plan for the entire district. This plan incorporated the following features:

1. Reassignments would affect Anglo and minority children in equal numbers. The effect between black and Hispano students would be proportional.

2. Kindergarten and special education children would remain in the schools to which they were currently assigned.

3. VOE at the elementary level would be discontinued.

4. Pairing and clustering of schools would be based on existing elementary school boundaries.

5. Each school in a pair or cluster would have only a portion of the elementary school grades. The grades were to be divided up in different ways for different schools. Some schools, for example, would have had only grades 1-3 or 4-6 or 5-6.

6. Continuity in student relationships would have been maintained through junior high as classes, once assembled, would not be divided up again.

7. Junior and senior high schools would be desegregated as the integrated classes fed into the upper schools.

8. Junior and senior high boundaries were redrawn to reflect the pairings and clusterings.

9. The plan also called for increased employment of minority aids, student teachers, parents and teacher assistants, community education efforts, an intensive training program for teachers in human relations, minority history and culture classes, and disciplinary fairness.

Plaintiffs' plan would have involved the additional transportation of approximately 20,000 students.[82]

This plan was devised by Dr. Michael J. Stolee, Associate Dean and Professor at the University of Maine School of Education. Since August, Dr. Stolee had been working with the plaintiffs' attorneys and familiarizing himself with the particulars of the Denver situation.

Plaintiffs also endorsed the so-called "Cardenas Plan". This plan was formulated by Dr. Jose Cardenas on behalf of intervenors, Congress of Hispanic Educators (CHE) and called for a bilingual/bicultural program designed to meet the particular educational needs of Denver's Hispano children.

The hearings began on February 19 and lasted about three weeks. Doyle played a very active role throughout--mastering the enormous amount of data presented and trying to understand their implications in terms of the overall workability of the proposed plans. The proceedings were complicated by the participation of five separate intervenors. These included CHE, Citizens Association for Neighborhood Schools (CANS), and other citizens who were concerned about the effects on their neighborhoods of the school closings included in the school board's plan, and about their continued opportunity to affect into decisions affecting their children's educations. According to one attorney, with the exception of CHE, none of the intervenors had a significant effect on the outcome of the proceedings.[83] They entered too late in the game to thoroughly understand the issues. They tended not to be well prepared and Doyle generally didn't pay them much attention. He was, however, very liberal in admitting intervenors. This was in keeping both with general 10th Circuit precedent and with the Judge's desire to hear a broad range of citizen viewpoints. His civility in these matters reached its greatest heights during the third day of the hearings.

Mr. Benson, representing intervenors CANS sought to be allowed to offer testimony on census data and how demographic distribution affects school population.

> MR. BENSON: If Your Honor would accept census statistics, we would be happy to argue it. The other one would be the Kansas study --
>
> THE COURT: We couldn't take that. It is hearsay as you know, and we are just not going to willy-nilly take every piece of material that is offered that doesn't have any show of trustworthiness, necessarily.

If it is a government document or there is a basis for saying it is trustworthy.

Where are you going to sit? We have run out of tables if we take you? Do you wnat to get back there with the press in the first row?

MR. BENSON: My client only wishes to intervene. We ask no favors.

THE COURT: You have to have a place to sit, usually. Can you bring your own table?

He is not going to cause any trouble. Is there any objection? Why don't we let him stay as long as he carries out his commitments?

MR. NABRIT: May it please the Court --

THE COURT: I realize we don't have to take him. This is a discretionary matter. He has come late. He is underlying premises that everything we are doing here is obnoxious to his people, but even so -- I am not going to retry the case. I have made it clear to him.

We are here for a limited purpose in selecting a plan that is rational as possible under the circumstances which will achieve the objectives that the Supreme Court has told us that we have to achieve, which will improve the educational opportunity, with children involved and do many other things, but we can't --- we are not going to have this courtroom used as a base for a propaganda effort or anything of this sort. Do you understand that?

MR. BENSON: Absolutely, Your Honor.

THE COURT: And you would adhere to this kind of a rule; is that right?

MR. BENSON: Absolutely.[84]

Later, in response to objections from opposing attorney Nabrit, Doyle said:

THE COURT: I realize there is disgression as to his coming late. There is really no need for letting him in, but, nevertheless, it is my disposition to allow Mr. Benson and his group to participate in these proceedings on the conditional basis with the understanding that they will not seek to go outside the issues that have been framed in this case.

MR. BENSON: If it please the Court, we wish to be constructive in this matter. We wish to be constructive and helpful to achieve the order which is ---

THE COURT: Well, you are in now. I don't know what you can add, so just ---

MR. BENSON: Only, Your Honor, we do not wish to be disruptive in this matter. We do not wish to block this proceeding. We only wish to be able to participate in a meaningful manner.

THE COURT: I have no reason to disbelieve you, Mr. Benson. We will take you at your word and we will go ahead on that basis. All right.[85]

Then Benson began his cross-examination of Dr. Roscoe Davidson, Assistant to the Superintendent of Schools:

BY MR. BENSON:

Q: Dr. Davidson, am I correct that in 1970 when Denver showed 72 percent of the City being Anglo, at that time, 61 percent of the school population was Anglo; is that correct?

THE COURT: Look! We are not going to try this issue. This is our understanding as to whether -- as to what the possible effects of integration are. We are not at liberty to do so, and I just resent your pursuing this kind of an element.

In other words, we have been through this country already. You weren't here, but these figures have been presented, and I just don't feel that you should do this, Mr. Benson.

Now, if you have got some material that you want to bring out, why you go ahead providing it is relevant to the issues we are trying; namely, selection of a proper plan that is responsive to the mandate under which we are working. Do you understand?

MR. BENSON: I believe so, Your Honor. If I could be ---

THE COURT: But I don't feel that we can make a finding that integration causes resegregation or white-flight, or anything of this sort.

I think that this question is designed to bring out that kind of an answer.

MR. BENSON: If Your Honor, please, the intent of the questioning is not for determining that segregation or integration per se causes white flight. What we would attempt to show would be that unnatural pressures caused through certain types of desegregation plans can provide more pressure upon the community and upon certain segments of that community.

THE COURT: I will take judicial notice of that; put some more pressure on everybody, including the Judge.

But that doesn't release us from the obligation to go forward to the job as well and as equitably as we can.

MR. BENSON: I would attempt to establish it by this line of reasoning, Your Honor, given certain pressures of ---

THE COURT: What is your offer of proof? What do you want to bring out?

MR. BENSON: What we would like to bring out is the fact that for some reason or another, the Anglo population in the City of Denver has been decreasing over a number of years.

The fact that up until 1963 the school population of the City of Denver had been increasing. Since that day ---

THE COURT: We know. It's in the record.

MR. BENSON: The fact that in suburban district, specifically Jefferson County, it is possible that within two or three years Jefferson County will surpass Denver in number of school children, indicating for some reason there is an expanded number ---

THE COURT: What is the conclusion to be drawn from all these basic facts?

MR. BENSON: The conclusion being that parents of school-age children as opposed to nonschool-aged children have felt uncomfortable for some reason or another and have moved to the suburban districts.

THE COURT: What effect can that have upon here in view of the way --

MR. BENSON: We are attempting to provide an adequate integration plan, Your Honor, which will hopefully have a lasting effect, which will --

THE COURT: So are we, of course, but --

MR. BENSON: Right.

THE COURT: But you needn't bring out this last question. I sustain the objection to it, because we know what the answer is.

Now, go to the next one. What else have you got?

MR. BENSON: Okay, Your Honor.

THE COURT: We are not going to have any propaganda arguments in here on this subject. That's what I tried to make clear to you at the start.

MR. BENSON: I do not attempt to bring out propaganda, Your Honor.

THE COURT: Let's try another one, please, another question.

MR. BENSON: Your Honor, could I just follow up the statement I was making to you just a second ago --

THE COURT: Let's ask your next question, if you will, please, Mr. Benson.[86]

A few minutes later Doyle went out of his way to attempt to acquaint Mr. Benson with a few basic facts:

Q: (By Mr. Benson) Are there any provisions within the proposed plan to provide for any protected schools, schools which maintain certain racial composition within its neighborhood, and therefore, exclude them from mandatory change programs?

> THE COURT: Yes, there is. Haven't you read this? I commend it to you, that it does take care of that problem. There is no question about it. This is not helpful at all.
>
> Have you read this? Do you have a copy of it?
>
> MR. BENSON: We have not been offered --
>
> THE COURT: Well, I will offer you one of those, and you should read it.
>
> MR. BENSON: I would be very happy to, Your Honor.
>
> THE COURT: It does have 54 schools which they maintain are integrated; isn't that right?
>
> MR. GREINER: That's correct.
>
> THE COURT: Fifty-four, which they say are integrated, and which are not -- do not require any attention.[87]
>
> Doyle ended the session graciously:
>
> THE COURT: I don't want to be disagreeable with you, Mr. Benson, because I don't think it bothers you much, and I think you are entitled to credit for that. I am not criticizing you, but I do hope we can get on a better basis tomorrow. I mean, if you are going to question, that it will be on a matter that is strictly relevant to the issues that we are bound to try here, because I am sure you understand that we are pressed for time, and we have got enough complications without introducing any further additional ones.
>
> And so we will be grateful to you if you will bear that in mind. Okay?
>
> MR. BENSON: All right.[88]

By the middle of the first week of hearings Doyle was already issuing informal guidelines as to the component of an acceptable desegregation plan. He spoke out against closing schools and reiterated the case for a half-time pairing scheme originally suggested by Art Branscombe, education reporter for the Denver Post.

Doyle also raised objections to specific aspects of the Stolee plan. One was that whites in a predominantly black neighborhood would be transported with black students to a predominantly white school (and for black living in a predominantly white neighborhood the equivalent would be true). This offended Doyle's idea of logistical common sense.

> THE COURT: You favor my idea -- I didn't invent it, by the way -- that if minority families moved to Anglo neighborhoods, that they would never be bused back?
>
> THE WITNESS: No. Your Honor.
>
> THE COURT: They would be immune from busing?
>
> THE WITNESS: No, Your Honor, I do not agree with that.
>
> THE COURT: You don't?
>
> THE WITNESS: No.
>
> THE COURT: Do you mean you would haul them back nevertheless?
>
> THE WITNESS: Yes, I would.
>
> THE COURT: Let us suppose Anglo people moved into a minority neighborhood.
>
> THE WITNESS: I would do the same, Your Honor.
>
> THE COURT: You would haul them back --
>
> THE WITNESS: Until that --
>
> THE COURT: From southeast Denver?
>
> THE WITNESS: Until that neighborhood got to the point where the neighborhood was integrated -- may I explain to the Court why I feel that way?
>
> THE COURT: How are you ever going to encourage them to do it if you don't give them some benefits?
>
> THE WITNESS: By getting -- but, Your Honor, I think --

THE COURT: You have to wait for 50 years to get it done?

THE WITNESS: No. I think what you would be doing by following that pattern would be more disturbing than hauling the children out, and that is breaking up any relationships that the children might establish within their neighborhoods. We might have a White child, and a Black child living next door to one another who normally would become friends, and play together, dolls or anything else.

THE COURT: Dolls?

THE WITNESS: If they are girls. I try to be bisexual about this, Your Honor, and we break up that relationship by sending one of them away and keeping one at home, and I think it is more important for those children to grow up together to get to know each other and go to school with each other, as well as play together outside of school than it would be to, you might say, immunize certain people in the neighborhood. I do like the concept of the neighborhood school, and that --

THE COURT: Well, it doesn't sound like it. Let us suppose the Chicano people are moving out toward the southwest part of town, for example. Do you mean to say that they still have to get bused from there even though they move in there and/or are seeking to integrate the neighborhood?

A: Until the neighborhood got to the point where the neighborhood could support an integrated school, I would say, yes, Your Honor.

Now, what goes with this hand-in-glove is that any school administration has to reassess its program of student assignment, every year, and that when a school, a neighborhood got to an integrated point, at that point the school should be taken out of any pairing or grouping and be permitted to operate strictly within its neighborhood.

THE COURT: I would agree with that, too, of course. Okay. But I don't mean that this would cover just movement. Let us suppose that people are already there. They have moved into neighborhoods previously. You feel the same way about that?

THE WITNESS: Yes, Your Honor.

THE COURT: You would still have them picked up and bused?

THE WITNESS: I think most people want their children to go to school with the children of their neighbors.

THE COURT: Not if they have to be bused, probably.

THE WITNESS: I think --

THE COURT: It wouldn't help integration to move them like that, would it?

THE WITNESS: Yes, it would, if done properly, and, Your Honor, what I am suggesting to the Court is that it would hinder integration if we did otherwise, if we were to immunize children, because then the relationships with the children in their neighborhoods would be effectively destroyed.

THE COURT: Well, then, you just agree with the Board of Education that when you are changing the attendance zone, you may call attention to the individuals who live in it. You just swoop up a group -- that's what I was told the other day -- regardless of what their ethnic situation is and move them to the other school?

THE WITNESS: I think you are referring to the dialogue you had with Dr. Davidson.

THE COURT: Well, I was referring to the Park Hill condition and the movement of children to G.W., that is, they moved Black students there in order to bring about some integration, but they move White students, too?

THE WITNESS: And I think they are proper in doing so, Your Honor, because they are not --

THE COURT: So they will be with their friends?

THE WITNESS: So they will be with their friends.

THE COURT: What if they haven't got any, though? It just seems kind of foolish to me to have a movement for the purpose of improving integration and to move people to the ethnic origin into -- of the school to which they are being sent?89

The Judge continued an aggressive cross-examination of Dr. Stolee. During the hearings of March 1, he hit on what he considered a basic flaw in the plaintiffs' plan -- its inflexibility:

> THE COURT: Well, this is one package, this elementary school and junior high school program. In other words, you can't detach them. Once you get started, you have to go, is that right?
>
> THE WITNESS: You mean on a child starting a given --
>
> THE COURT: No, if you start adopting this program, you have got to take it all?
>
> THE WITNESS: Oh.
>
> THE COURT: There is no compromise, no room for change.
>
> THE WITNESS: I believe that --
>
> THE COURT: Because when you have one that is dependent upon a number of constituents, if you pull one out, it throws the whole machinery into chaos, doesn't it?
>
> THE WITNESS: To some respect, it does, Your Honor, but not unmanagable chaos. It can be worked out.
>
> Q: For example --
>
> A: For example --
>
> THE COURT: Just violent chaos?
>
> THE WITNESS: Yes, sir.[90]

On March 4th the Court instructed both plaintiffs and defendants to meet with a Court-appointed consultant, Dr. John A. Finger, Professor of Education at Rhode Island College, to collaborate on a new plan. At the end of that day's hearings, Doyle further delineated the features of the kind of desegregation plan he would consider acceptable.

It is obvious that he has studied the particulars of the situation carefully and is able to be quite detailed about what he wants and about what issues have yet to be satisfactorily resolved. An excerpt:

> THE COURT: And College View, I don't think needs anything. It is an integrated school. It ought to stay right where it is. I don't know why you should even fool with it.
>
> Now, I think Fairmount could be desegregated with not necessarily walking, but on a very short distance basis with either Moore or Bromwell or both perhaps, and here again you might choose to use Sherman in part.
>
> Now, it bring us to, say, Columbine and Whittier and Harrington and Garden Place and Swansea. These are heavily concentrated schools and you are going to have to bus, there is no question about it, and I think that I would like to try out this pairing and like to try out the business of having a home school and having the transportation, not necessarily 9:00 o'clock in the morning, but for a half day period, so somewhere along the line everybody would get home in time to have some activities at the home school before and after, and so that they can be available to their parents.
>
> Now, this is what I have got in mind.
>
> Now, when we come to Manual I think some plan has gone to come up to bring about desegregation, and on Cole you are going to have to do the same thing or else come up with a program that would suffice. I think it has got a lot of special programs that are going on, but it is not a satisfactory condition and I would be open to any suggestions that would improve it.
>
> I think that I would like to see Manual become a campus with East once you get it desegreated and then you can develop these programs and if they will bring about desegregation, fine, and dandy, we can get rid of this transportation.
>
> Baker I feel ought to be desegregated in the area. There are plenty of junior high schools. There seems to be a great abundance of them in the southwest part of the city. I don't know why there cannot be a workup to reduce the concentrations at Baker. I do feel that Baker should be thought of with West and with Del Pueblo as a part of our program to introduce this

> bilingual bicultural education, and I feel that similarly Cole and Manual ought to. Perhaps Columbine should be part of the program as a center, in addition to their other activities, of course. I mean it shouldn't take over for bicultural students.
>
> Well, this is nothing, no magic. It's just a few ideas that might produce something that will not have buses running wild.
>
> As I say, there is going to be some transportation, no matter what, and you may be able to find some flaws in this, and if so I would like to know about it, and you can also work out some better engineering. If you can, that's fine. I am glad to hear about that, but I still think that the VOE ought to be retained, and I feel that every effort should be made to encourage people and to encourage integration of neighborhoods. I don't know whether this is possible.[91]

The prospects for meaningful collaboration were not great:

> MR. GREINER: Then next my question is, are you asking the parties to attempt to agree if they can, and then what happens if we can't agree?
>
> THE COURT: No, I want them to collaborate. You do not have to agree. Just collaborate on a program such as I have outlined. I will give you some guidelines.
>
> MR. GREINER: Using the schools that you have described in the manner that you have described?
>
> THE COURT: Well, not necessarily. You may have some ideas. You may have some maps and other materials to work from.
>
> MR. GREINER: We have sure got those.
>
> THE COURT: No shortage of maps.
>
> MR. GREINER: All right.
>
> MR. RIS: So far as the administration is concerned, the staff people and all the Court has requested this. Is this a direction?
>
> THE COURT: Yes, mandate.

> MR. RIS: All right, that's all I wanted to know, so they will know, too.[92]

When the board resolved to adopt Superintendent Kishkunas' plan on January 22, they did so only with the specific disclaimer that adoption of the plan designated compliance only with the Court's orders; it did not in any way signify approval of the plan on its merits. Doyle addressed this issue directly on the March 8th hearings:

> THE COURT: And they do have some apprehension, the District does, and the members of the Board do, that if they were to come forward with a program or a plan even under orders of the Court to do so, that they might jeopardize their legal position. Is that true?
>
> MR. JACKSON: I don't believe I have heard that expressed in those words by the Board, Your Honor, and I have not spoken with them directly.
>
> Certainly our advice to them earlier was that they would not jeopardize their position by presenting the plan which was the subject of the hearing which we held before.
>
> THE COURT: Well, the point is this: I don't want to be hamstrung waiting unnecessarily, and yet I would have to, under the cases, give the District every opportunity to come up with a plan, because it is their duty to do so under the law, you know.
>
> But at the same time there is no use in pursuing a futile objective. Do you see my point?
>
> MR. JACKSON: Yes.
>
> THE COURT: And so you have a pretty good idea as to what a desegregation plan means under the law and as to what has to be done, that with the concentrated schools, there is no alternative to a plan involving transportation of students, busing, so to speak, in order to dismantle a segregated condition, and every indicia I have seen tells me that the Board isn't going to embrace even a plan that does this.

MR. JACKSON: If I may, Your Honor, I am somewhat still confused.

It was not my impression from the Court's remarks from the bench on Friday or on a Monday, rather, or in the lesser and subsequent grouping of schools that followed, that the Court was directing the School District to come back with a new plan, and I seem to sense a certain amount of that in the Court's comments today.

THE COURT: Oh, no, no. I just didn't -- I didn't think they could, and I simply wanted you to confirm that fact or would, you know.

In other words, I gathered that from the evidence that is now presented, namely that the Board members wouldn't even embrace or endorse the plan that the District has presented?

MR. JACKSON: Certainly they all have their reservations about it.

THE COURT: So after *a fortiori*, they wouldn't take it *a multo fortiori*.

MR. JACKSON: I can't respond directly to this, Your Honor.

THE COURT: I am just trying to cut through some red tape. That's all.

I mean, I don't want you to come up later and say, Well, you didn't give us full opportunity to present a plan," you know.

MR. GREINER: Your Honor, if I could interject something.

If I sense a problem here, it is that nobody wants the Court to issue an order which the Board would feel bound not to comply with, and I suppose the question is: If the Court were to order further submission of the plans by the defendant, could the Board do it? Would the Board do it?

THE COURT: Right.

In fact, as Doyle suspected, the school district had no intention of devising an acceptable plan. Originally, Superintendent Kishkunas began to formulate a plan that would have emphasized substantial "moving of bodies" and would have resulted in substantial desegregation. The board then gave Kishkunas specific instructions not to desegregate to any significant degree. He and his task force were specifically instructed not to work with plaintiffs in devising a plan. The School Board's strategy was one of attempting to observe a minimalist interpretation of the letter of the Court's order. They did this to avoid the "hassles" that Court-ordered desegregation threatened to bring to Denver. They felt it would be far easier, both in terms of their narrow political interests and in terms of community acceptance, to implement a Court-mandated plan than one they had a major role in creating. Their intention was that Kishkunas "take the heat" for a poor plan.

This strategy of recalcitrance also precluded full cooperation with Dr. Finger. The administration provided the computerized residency data and other information requested by Dr. Finger but made no attempt to furnish him with answers to questions he didn't specifically ask. Members of Kishkunas' desegregation task force felt that some of the short-comings of the Finger plan including some instances of long-range busing could have been alleviated had they provided Finger with information about some of the "ins and outs" of the Denver school system that could not be acquired through years of experience.[94] It is also conceivable that had the School Board made a good faith effort to come up with an acceptable plan, they would have ended up with something less offensive to them than what was actually ordered.

This possibility was, of course, precluded by the board members' perception of their duty to honor their antibusing mandate. Many participants in the proceedings commented on Doyle's patience in the face of this overt recalcitrance.[95] His comments on March 27 bear witness to this:

> THE COURT: As most of you know, the primary purpose of today's proceedings is to take up, present, and have a hearing on the proposed plan which has been put together by Dr. John A. Finger, Jr.
>
> As you also know, I think the record ought to show it, we held a hearing about three weeks ago for two weeks, completed about three weeks ago, and at the end of that time, I mentioned a few -- while rejecting both the plans submitted -- I mentioned a few ideas, suggestions that had come to my mind during the course of the proceedings, and really, what I had in mind was that the parties would get together, and implement those suggestions and see how it looked, at least, test it out, and what I really wanted to do, I think, and I believe that the record bears this out, was to eliminate any technical bugs that were in it, and present it in the form of a plan so we could either reject it or accept it. But this never did occur.
>
> There were some meetings of the two parties, but it didn't bear any fruit. The result of these meetings was that there were just discussions, more or less, and so the School District was asked whether it was possible for them to produce a creative, innovative plan, and I was given to understand on two or three occasions that the School District felt constrained to abstain, so to speak from any kind of meaningful participation; that they would make their facilities and their staff, their computer available to the Court for the purpose of work-ups, and this kind of thing.
>
> I must say that while the Board eschewed any opportunity to participate directly or indirectly, the staff, the School Administration's staff, has responded to direct orders from the Court to prepare work-outs, and they cooperated with Dr. Finger in preparing work-ups for him, and here recently, I told them, and they agreed that this is the way they wanted to do it, that it was permissible for them to expressly say that they did not warrant any of their work product. They

> didn't directly or indirectly, expressly or impliedly say that it could succeed. On the contrary, they clearly disclaimed their efforts in many instances. In one or two instances, they came forward with some ideas with respect to implementation of a plan that they felt would be of value, and I think it will be of value, too, with respect to the preparation of the students and the preparation of the parents, and the preparation in working out a method for implementation for transportation that will prevent any difficulties.
>
> So that's where we are, and thus, I think we can proceed. It became apparent, all of this demonstration is necessary, as I said before. We are just not going through a lot of motions. The Supreme Court of the United States has repeatedly declared that it is the job of the School District to desegregate, and I have to give them every opportunity to do so in order to comply with the law, and it is very plain now that they cannot -- they are not going to, and so with the aid of the Court's consultant, a plan has been prepared, or rather, he has prepared it. I don't warrant it. He is here to present it. All right.[96]

On April 5, 1974, Dr. Finger formally presented his plan to the Court. Doyle issued his memorandum, order and opinion three days later. In it he states his reasons for rejecting the plans of both plaintiffs and defendants. With regard to the former:

> As is apparent from the above description, the plaintiffs' plan is what is known as a pairing plan calling for the busing of one-half of the student population in each of two schools or a total of one-half in a group of clustered schools. The difficulty we find in possible adoption of this is, first, that it is too tightly structured. It undertakes to govern the child from the time he commences the first grade in elementary school until he has completed high school. Each component is interrelated with the other so that if for any reason one part fails it may well have repercussions on the remainder of the program and it could create chaos. Its complexity would require a resident expert. Second, it involves extensive busing and does not distinguish between busing the minority and majority students. Thus, a movement of minority

> students to a non-integrated Anglo school would oftentimes carry not only minority students but many Anglo students as well. The opposite would also be true. The movement of Anglo students would in many instances carry with it minority students to what had been a minority school. Third, the way the plaintiffs propose the plan, there is no room for adjustments because the teacher at the minority school, for example, would be automatically reassigned to the majority school to teach that particular grade. At the receiving school there would be at least two first grade classes, two second grade classes and two third grade classes, so it would be impossible for any students to remain at the neighborhood school. The system would work better in schools which are highly concentrated. The criticisms mentioned would not be significant if there were one percent or two percent of the opposite race transported. In our school system we have some schools of this character, but these are the exceptions. In most schools the concentrations, although often heavy, are less extreme and therefore a large number of Anglos would be bused with minorities. More efficiency would exist as well as less basis for criticsm if the transportation system were confined to either minorities or Anglos. (380 F. Supp. 673 at 681)

Doyle then goes on to cite some of the advantages of the proposed pairing plan but concludes:

> In the final analysis, however, because of its extensive transportation of students, plaintiffs' program is unacceptable as presented. (380 F. Supp. at 682)

With respect to defendants' proposed plan the reason for rejection is, quite simply, that it would not produce significant desegregation. In fact, by closing the eleven core-city schools, defendants' plan would actually tend to further isolate minority students in minority schools in North Denver from the majority schools in the South.

The Court adopted Finger's plan as presented on April 24th with minor modifications. Its major features were:

1. Elementary Schools. Twenty-four elementary schools were to be desegregated by rezoning. Thirty-three were to be desegregated by pairing on a half-day basis. Classes themselves were to be divided leaving the full complement of grades at each of the paired schools. Students were also to be bused from a number of satellite attendance zones to integrated schools. Five heavily Hispano schools were exempted from the desegregation requirements. In the case of four of them the rationale for exemption rested on the implementation of the Cardenas bilingual/bicultural program. For the most heavily segregated, Boulevard, no rationale was offered.

2. Junior High Schools. Most junior high schools were to be desegregated through rezoning. In addition, five satellite attendance zones were created.

3. Senior High Schools. The plan called for East and Manual to be consolidated into a single magnet school complex with special educational offerings. Some boundary changes and satellite zoning were also ordered.

The Court adopted an Anglo enrollment of 40% to 70% as the guideline for desegregation in the elementary schools and a somewhat higher minimum for the secondary schools. (380 F. Supp. 673 at 686) Dr. Finger estimated that 15,870 students would be bused in total--about 70% of them minority. The School Board estimated the number who would be bused to be almost 24,000.

Other key provisions of the decree included:

> 1. Voluntary Open Enrollment. The board was instructed to hold in abeyance its voluntary open-enrollment program pending resolution of various details of the Finger plan, but in any event, subject to elimination of current

restraints on participation in the program by minority students (refusal of voluntary transfers to minority students to Anglo schools having combined black-Hispano enrollments exceeding the district-wide average).

2. Collateral Services. The board was instructed to maintain "to the extent feasible" on-going programs of "collateral" services such as hot breakfast programs, free lunches, tutorial programs, health services, remedial and compensatory education programs.

3. Busing. The board was instructed to file plans with the court and to make immediate purchases of equipment for implementation of the busing required in the Finger plan.

4. In-Service Teacher Training. The board was instructed to implement its own proposals for orientation and training of parents, pupils, school personnel, and staff as proposed to the court in the February hearings.

5. Monitoring Commission. This key aspect of the decree required both parties to submit to the court nominees for appointment to a commission, initially to serve until June 1, 1975, at the expense of the district, to act as a liaison between the court and the "community" as to such matters as: coordination of community efforts to implement the plan; community education; receipt and consideration of criticism and suggestions from the community regarding the plan; assisting the community in working out programs with the school administration; reporting to the court as to the nature and resolution of such problems; and generally reporting on a periodic basis to the court about implementation of the plan.

6. Bilingual-Bicultural Education. The school district was ordered to implement the model plan presented by CHE or a plan "substantially and materially similar," retaining a qualified consultant to develop the program and implement the plan on a pilot basis at three elementary schools and one junior high and one senior high school.

7. New School Construction. The defendants were enjoined from locating new schools or additions thereto in a manner conforming to patterns of residential segregation and were required to submit all plans for new schools or additions thereto to the court, with notice to counsel for the plaintffs and provision for hearings to air objections within thirty days of reporting to the court.

8. Reporting. The court set forth formal and detailed reporting requirements on a monthly schedule beginning May 1, 1974, through September of 1974 as to plans and administrative details regarding implementation of the Finger program.

9. Additional Reporting. The defendants were instructed to report within thirty days of the commencement of the fall semester in 1974 and the second semester in 1975 on an extensive array of statistical phenomena including ethnic distribution of pupils and teachers, distribution of tenured and probationary teachers, student dropouts and suspensions, the number and nature of special administrative and hardship transfers, and actions taken to implement the bilingual-bicultural program.

10. Desegregation of Faculty and Staff. The school district was instructed in detail as to the permissible standards for assignment of faculty and staff among all schools in the district and required to implement immediately an affirmative action program for hiring minority teachers, staff, and administrators with the objective of attaining a ratio of Hispano and black personnel within the district corresponding to the overall black and Hispano student population of the district.

11. Foot Dragging. The Board was instructed to "take steps to prevent the frustration, hinderance or avoidance of this Decree, particularly with regard to spurious transfer and falsification of residence to avoid reassignment."

12. Harassment. "Any attempt to hinder, harass, intimidate, or interfere with the School Board, its members, agents, servants, or employees in execution of this Order shall be reported to the Department of Justice through the United States Attorney for the District of Colorado."

13. Fees of Dr. Finger. These fees were taxes to the school district, "since the services of Dr. Finger were necessary to the development of an adequate and acceptable plan."

14. Plaintiffs' Attorney's Fees and Costs. The school district was ordered to pay an award of attorney's fees and costs to plaintiffs' attorneys accruing since the inception of the lawsuit in June of 1969.[97]

The half-time pairing component of the District Court seems to have aroused great ire from attorneys for the plaintiffs. The Finger plan greatly disappointed those supporting comprehensive desegregation in Denver. Knowledgeable participants on both sides of the dispute recognized that Stolee's plan was more representative of Denver and more competently organized from a technical point of view. Gordon Greiner felt that Doyle was inclined to accept Finger's proposals over Stolee's not so much because of their superior substantive merits, but because there was a better chance of cooperative implementation between the school district, the community at large, and a relatively neutral consultant than between the district, the community, and plaintiffs.[98]

Adoption of the half-time pairing component particularly irritated the pro-desegregationists with some seeing it as a concession to community pressure in general.[99] Art Branscombe suggested that Doyle opted for a more palatable plan as a response to the threatened exodus of white students to private schools which was an issue in the spring of 1974.[100] In any case, the Finger plan with its half-time desegregation contributed to the gradualization of the move toward full integration in Denver. One wonders whether Boston-style violence was avoided in Denver partly due to the sheer span of time between race and schooling first becoming a community issue in the middle 1960s and its final culmination in a comprehensive plan a decade later. Desegregation in Denver was achieved by degrees. The long process may have allowed for a (perhaps subconscious) appreciation of the position of the opposing side and an extended opportunity for full engagement which defused much of the potential for serious disruption.

Two days after the decree was issued plaintiffs sought a Stay of Final Decree and Judgment through the District Court.[101] It was denied.

On May 16 the School Board passed Resolutions 1768 and 1769. The first instructed its attorneys to appeal the final decree and judgment to the 10th Circuit Appeal Court. The latter called for the superintendent and his staff to "do all in their power to make all necessary preparations. . . to prepare to meet the Order of the Court." Plaintiffs also appealed. Appeals of both parties reached the Circuit Court on February 10, 1975. The decision was handed down on August 11, 1975. The Appeal Court upheld the lower court's decision on the following points:

1. The scope of the remedy. The District Court did not err in ordering district-wide desegregation.

2. Percentage guidelines for desegregation. The District Court interpreted Swann correctly by using flexible numerical ratios as a starting point in shaping its remedy.

3. Rezoning. Contrary to the School Board's contention, the District Court did not arbitrarily and unnecessarily alter attendance boundaries of schools already desegregated. In moving from partial to system-wide desegregation such rezoning falls within the ambit of the court's discretion.

4. Minority transportation. Plaintiffs challenged the legality of the Court's plan on grounds that minority students would bear a disproportionate share of the busing. While acknowledging that plaintiffs' plan would have distributed the burden more evenly, the Appeal Court also noted that the plaintiffs' plan would have resulted in more overall transportation and concluded that the busing plan as ordered implied no invidious discrimination.

5. *Affirmative action*. The School Board unsuccessfully challenged the affirmative action of the Court's plan to desegregate faculty and staff pointing out that it did not differ in substance from the defendants' own personnel desegregation proposal. (521 F.2d 465 at 484)

The Appeal Court also remanded or vacated four important aspects of the District Court's plan:

1. *Half-time pairing*. The Appeal Court affirmed plaintiffs' contention that the half-time pairing feature of the Finger plan was Constitutionally inadequate, that the interest in preserving neighborhood schools was outweighed by the Constitutiional right to attend desegregated schools. This right includes full-time attendance in a desegregated setting. (521 F. 2d at 478)

2. *Segregated Hispano schools*. Ruling that bilingual education is not a substitute for desegregation and citing *Swann*; "The district judge should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools" (402 U.S. 1 at 26), this portion of the plan was remanded to the lower court for a determination of whether the continued segregation at the five Hispano schools could be supported for reasons other than the bilingual/bicultural education program. (521 F.2d at 480)

3. *Bilingual-bicultural education*. The Appeal Court vacated that part of the District Court's order that would have required the school board to implement the Cardenas bilingual-bicultural education program and remanded for a determination by the lower court whether any additional

relief was needed to ensure that minority children have the opportunity to become proficient in English. The Appeal Court stated: "The clear implication of argument in support of the court's adoption of the Cardenas Plan is that minority students are entitled under the 14th Amendment to an educational experience tailored to their unique cultural and developmental needs. Although enlightened educational theory may well demand as much, the Constitution does not." (521 F.2d at 482)

5. East-Manual Complex. The Appeal Court vacated the portion of the court's plan mandating the creation of the East-Manual Complex on grounds similar to its rejection of the Cardenas Plan: "...the court appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution". (521 F.2d at 483)

The School Board and CHE petitioned the Appeal Court for a rehearing. It was denied on September 16, 1975.[102] They then petitioned the Supreme Court for review and were denied on January 12, 1976.[103] On that date the appeal process finally came to a close.

On February 9, 1976, the School Board was ordered by the District Court to modify the part-time pairing plan then in operation so as to bring about a full-time desegregation program. The board originally framed two proposals. One would have retained the usual grades 1-6 organization in each school. The other would have divided the schools into all primary schools (grades 1-3) and all intermediate schools. Attorneys for the School Board met with plaintiffs' attorneys to hammer out a jointly-approved plan to submit to the court. (This was possible since the School Board elections of 1975 which, after 6 years, restored a pro-desegregation majority to the Board.) Both sides expressed satisfaction with the outcome saying that the final proposal contained "compromises from all sides". The compromises included several changes in busing patterns to increase percentages of Anglo students in at least nine elementary schools. Administration staff predicted the plan would produce an 80% increase (from 3889 to 7100) in the amount of elementary student busing.[105] The proposed plan also included provisions for the desegregation of the five previously exempted elementary schools. In spite of strong anti-desegregation sentiment in the Hispano community voiced most powerfully by Rudolfo ("Corky") Gonzales and his Crusade for Justice which favored community control of Hispano schools, CHE took no legal action to prevent the desegregation of the five schools.[106]

The bilingual program is currently confined to grades K-3 and is very limited in scope compared to the original Cardenas plan. The litigation on this issue is not yet fully resolved. The main arena is no longer in the courts however, but the Colorado State Legislature which authorizes money for the program.[107]

The School Board, on its own initiative, decided to retain the East-Manual Complex idea with special educational offerings.[108]

On March 26, 1976, Doyle ordered the adoption of this plan and its implementation that September.[109]

In April, Doyle handed responsibility for the Keyes case to District Judge Richard P. Matsch describing him as "an A-1 individual and an able judge". He mentioned as his reason for relinquishing his duties that his position on the 10th Circuit Court of Appeal demanded his full attention adding: "Besides, it's time some of the blessings were passed around".[110]

In August, 1977, the final published opinion was issued in favor of awarding plaintiffs' attorneys $360,100 in fees and $26,056 in costs.[111]

Interviews

Craig S. Barnes, Attorney, Barnes and Jensen, Denver, Colorado, Personal Interview, August 28, 1978.

Naomi Bradford, School Board Member, Denver Public School System, organizer of Citizens Association for Neighborhood Schools (CANS), Personal Interview, August 24, 1978.

Art Branscombe, Education Reporter, Denver Post, Personal Interview, August 22, 1978.

Benjamin L. Craig, Attorney, Henry, Cockrell, Quinn and Creighton, Denver, Colorado, Personal Interview, August 30, 1978.

Charles F. Craley, Administrator, Member of Superintendent's Taskforce on Desegragation, Denver Public School System, Personal Interview, August 28, 1978.

Evie Dennis, Administrator in charge of in-service training program for teachers, Denver Public School System, Personal Interview.

Judge William E. Doyle, Appeals Court Judge, 10th Circuit Court of Appeals, Personal Interview, August 30, 1978.

Gordon Greiner, Attorney, Holland and Hart, Denver, Colorado, Personal Interview, August 27, 1978.

Michael Jackson, Attorney for Denver Public School System on retainer from Henry, Cockrell, Creighton and Quinn, Personal Interview, August 25, 1978.

George Morrison, Administrative Director for Secondary Schools, Denver Public School System, Chairperson, Superintendent's Taskforce on Desegragation, Personal Interview, August 28, 1978.

Rachel Noel, Professor, Black Studies Department, University of Denver, Former School Board Member, Denver Public School System, Personal Interview, August 28, 1978.

Walt Oliver, Assistant Superintendent for Elementary Schools, Denver Public School System, Personal Interview, August 28, 1978.

James C. Perrill, Attorney, Denver, Colorado, Former State Senator, Former School Board Member, Denver Public School System.

Lorie Young, Division of Housing, State of Colorado, Former President, League of Women Voters, Denver, Colorado, Personal Interview, August 25, 1978.

Footnotes

1. Denver Post, July 17, 1969.
2. Interviews with Rachel Noel, August 28, 1978, and Benjamin L. Craig, August 30, 1978.
3. Denver Post, September 6, 1968.
4. Interview, Benjamin L. Craig, August 30, 1978.
5. Rocky Mountain News, October 15, 1968.
6. Interview, Art Bronscombe, August 22, 1978.
7. Interview Benjamin L. Craig, August 30, 1978.
8. Interview, James C. Perrill, August 24, 1978.
9. Interview, Benjamin L. Craig, August 30, 1978.
10. Interview, Craig Barnes, August 28, 1978.
11. Interview, Craig Barnes, August 28, 1978.
12. Interview, Benjamin L. Craig, August 30, 1978.
13. 303 F. Supp. 279, at 281.
14. Interview, Craig Barnes, August 28, 1978.
15. Interview Benjamin L. Craig, August 30, 1978.
16. Rocky Mountain News, February 24, 1969.
17. Interview, Judge William E. Doyle, August 30, 1978.
18. Interview, Benjamin L. Craig, August 30, 1978.
19. Hearings, Civil Action No. C-1499, July 22, 1969, pp. 746-751.
20. Rocky Mountain News, July 23, 1969.
21. Hearings, Civil Action No. C-1499, July 22, 1969, p. 746.
22. *Id*. at 751-752.
23. *Id*. at 755.
24. Interview, Ed Benton, August 29, 1978.

25. Hearings, July 22, 1969, pp. 755-756.

26. Hearings, July 7, 1969, pp. 38-39.

27. Rocky Mountain News, August 6, 1969.

28. Denver Post, August 14, 1969.

29. Interview, Benjamin L. Craig, August 30, 1978.

30. Interview, Craig Barnes, August 28, 1978.

31. Interview, Benjamin L. Craig, August 30, 1978.

32. Interview, Craig Barnes, August 28, 1978.

33. Unpublished opinion, 10th Circuit Court of Appeal, September 15, 1969.

34. Interview, Gordon Greiner, August 27, 1978.

35. Interviews, Michael Jackson, August 25, 1978, and Benjamin L. Craig, August 30, 1978.

36. 313 F. Supp. 61 at 63.

37. Interview, Craig Barnes, August 28, 1978.

38. Hearings, February 4, 1970, pp. 498-499.

39. Id. at 501.

40. Id. at 504-505.

41. Id. at 506.

42. Id. at 507.

43. Hearings, February 11, 1970, pp. 1308-1310.

44. Interview, Craig Barnes, August 28, 1978.

45. Interview, Lorrie Young, August 25, 1978.

46. Interview, Ed Benton, August 29, 1978.

47. Interview, Ed Benton, August 29, 1978.

48. 313 F. Supp. 61 at 84.

49. Supreme Court of the United States, October Term, 1971, No. 71-507, Appendix Vol. 4, Hearings, May 11, 1970, pp. 1536a - 1537a.

50. _Id_. at 1546a - 1547a.

51. _Id_. at 1558a - 1559a.

52. _Id_. at 1608a - 1614a.

53. _Id_. at 1515a - 1516a.

54. _Id_., May 12, 1970, pp. 1685a - 1686a.

55. _Id_., May 14, 1970, pp. 1929a - 1930a.

56. _Id_. at 1933a - 1935a.

57. _Denver Post_, May 12, 1970, and 313 F. Supp. 90, at 91.

58. _Denver Post_, May 10, 1970, and 313 F. Supp. 90, at 91.

59. 313 F. Supp. 90, at 92.

60. Plaintiffs' Notice of Appeal (Cross-Appeal), filed June 24, 1970.

61. _Denver Post_, March 31, 1971.

62. _Denver Post_, February 28, 1971.

63. Interview, Art Branscombe, August 22, 1978.

64. _Denver Post_, March 18, 1971.

65. _Denver Post_, April 28, 1971.

66. _Denver Post_, May 8, 1971.

67. _Denver Post_, May 25, 1971.

68. _Id_.

69. _Denver Post_, September 9, 1971.

70. Unpublished _Chronology of Keyes v. School District #1_, League of Women Voters, Denver.

71. _Denver Post_, September 9, 1971.

72. _Id_.

73. Interview, Gordon Greiner, August 27, 1978, and _Denver Post_, October 16, 1971.

74. Interviews, Michael Jackson, August 25, 1978, and Gordon Greiner, August 27, 1978.

75. Interview, Michael Jackson, August 25, 1978.

76. Interview, James C. Perrill, August 24, 1978.

77. Unpublished *Chronology*, *supra* Note 70.

78. Interview, Gordon Greiner, August 27, 1978.

79. Unpublished *Chronology*, *supra* Note 70.

80. *Id*.

81. *Denver Post*, January 23, 1974.

82. *Rocky Mountain News*, January 24, 1974.

83. Interview, Michael Jackson, August 25, 1978.

84. Hearings, February 21, 1974, pp. 524-525.

85. *Id*. at 526-527.

86. *Id*. at 753-756.

87. *Id*. at 766.

88. *Id*. at 768-769.

89. Hearings, February 27, 1979, pp. 1612-1616.

90. Hearings, March 1, 1974, pp. 1927-1928.

91. Hearings, March 4, 1974, pp. 2323, 2325.

92. *Id*. at 2329.

93. Hearings, March 8, 1974, pp. 5-7.

94. Interviews, Charles F. Croley and George Morrison, August 28, 1978.

95. Interview, Gordon Greiner, for example, August 27, 1978.

96. Hearings, March 27, 1974, pp. 2337-2339.

97. Jessica Pearson and Jeffrey Pearson, "*Keyes v. School District No. 1*" in Howard I. Kalodner and James J. Fishman, eds., *The Limits of Justice: Courts' Role in School Desegregation* (Cambridge, Mass.: Ballinger, 1977), pp. 203-205.

98. Interview, Gordon Greiner, August 27, 1978.

99. Interview, Lorrie Young, August 25, 1978.

100. Interview, Art Branscombe, August 22, 1978.

101. Denver Post, April 26, 1974.

102. Rocky Mountain News, September 17, 1975.

103. "Keyes," supra Note 97 at 192.

104. "Special Report," Denver Public Schools, May 1976.

105. Rocky Mountain News, March 18, 1976.

106. Los Angeles Times, November 27, 1977.

107. Interview, Art Branscombe, August 22, 1978.

108. Id.

109. "Special Report," Denver Public Schools, May 1976.

110. Rocky Mountain News, April 23, 1976.

111. 439 F. Supp. 393.

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